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In The

Supreme Court of the United States

October Term 1992

EMPLOYERS INSURANCE OF WAUSAU IN ITS OWN RIGHT, AND AS REPRESENTATIVE OF THOSE CERTAIN UNDERWRITERS SUBSCRIBING TO CERTIFICATE NO. 14880,

Petitioners,

vs.

OCCIDENTAL PETROLEUM CORPORATION, SUWANNEE RIVER SPA LINES, INC., SUWANNEE RIVER CHARTERING, INC., AND OCCIDENTAL CHEMICAL AGRICULTURAL PRODUCTS, INC.,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether an insurer must pay for the loss of a vessel judicially determined to have been caused solely by an open, obvious and discovered condition of unseaworthiness present at the inception of the policy.

2. Whether a breach of the warranty of seaworthiness implied at the inception of a time hull policy of marine insurance avoids the contract.

3. Whether the Liner Negligence Clause of such a policy operates as a partial waiver of the warranty.

4. Whether the foregoing questions were appropriately resolved on the summary judgment record in this case.

LIST OF PARTIES AND RULE 29.1 CERTIFICATE

The following parties participated in the proceedings below:

Chiyoda Fire & Marine Insurance Company

Employers Insurance of Wausau

Inland Underwriters Insurance Company

Occidental Chemical Agricultural Products, Inc.

Occidental Petroleum Corporation

Rochdale Insurance Company

Suwannee River Chartering, Inc.

Suwannee River SPA Lines, Inc.

The Netherlands Insurance Co.

Unigard Mutual Insurance Co.

Unione Italiana Reinsurance of America

United Americas Insurance Co.

United States Fidelity and Guaranty Co.

This Petition is filed on behalf of Employers Insurance of Wausau and Those Certain American Underwriters Subscribing to Certificate No. 14880 (the "American Underwriters"). Wausau was a subscribing underwriter and representative of the individual American Underwriters, who are: Chiyoda Fire and Marine Insurance Company; Rochdale Insurance Company; Unigard Mutual Insurance Co.; Unione Italiana Reinsurance of America; United Americas Insurance Company; The Netherlands Insurance Company; United States Fidelity & Guaranty Co.; and Inland Underwriters Insurance

LIST OF PARTIES AND RULE 29.1 CERTIFICATE – Continued

Agency. Employers Insurance of Wausau is a subsidiary of the Wausau Insurance Companies group, and United States Fidelity & Guaranty Co. is a corporate affiliate of USF&G Corporation. Of the remaining corporations constituting the American Underwriters, there are no parent or subsidiary corporations to be listed.

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The opinion of the Appellate Court is reported as *Employers Insurance of Wausau v. Occidental Petroleum Corporation*, 978 F.2d 1422 (1992), *reh. den.* ___ F.2d ___ (5th Cir. 1993). The District Court opinion is reported only as *Employers Insurance of Wausau v. Avondale Shipyards, Inc.*, 1992 A.M.C. 477 (E.D. La. 1991).

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1) on the ground that the Court of Appeals for the Fifth Circuit has decided an important question of federal law which has not been, but should be, settled by this Court. Judgment affirming the District Court's grant of summary judgment in favor of Occidental was rendered and entered by the Court of Appeals on December 10, 1992. On December 21, 1992, the Court of Appeals granted an extension of time to and including January 25, 1993 for the American Underwriters to file a Petition for Panel Rehearing. The Petition for Rehearing was timely filed within this extended period on January 25, 1993. The Court of Appeals denied rehearing by order dated and entered February 10, 1993. Accordingly, this Petition complies with the requirements of 28 U.S.C. § 2101(c) and Rule 13 of this Court.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

This matter concerns the interaction of the warranty of seaworthiness implied at the inception of time hull policies of marine insurance with Inchmaree or Liner Negligence Clauses included in those policies. As the questions involved in this case arise under the general maritime law, See *D.J. McDuffie, Inc. v. Old Reliable Fire Ins. Co.*, 608 F.2d 145, 147 n.1 (5th Cir. 1979), *cert. denied*, 449 U.S. 830, 101 S.Ct. 97, 66 L.Ed. 2d 35 (1980), there are no constitutional provisions, treaties, statutes, ordinances or regulations implicated.

STATEMENT OF CASE

This dispute arises out of the sinking of the OXY PRODUCER, the tug unit of a catug integrated tug/barge vessel ("ITB"), off the Coast of the Azores on September 20, 1981. The OXY PRODUCER, and her barge, the OXY 4102, were the second in a series of three ITBs specially constructed for Occidental Petroleum Corporation ("Occidental") to transport superphosphoric acid across the Atlantic to Russian ports on the Black Sea.

A catug ITB is composed of a tug and a barge unit "mated" through an interconnection system. The tug has two catamaran hulls connected by a crossover structure. A ledge protrudes from the lower portion of each catamaran hull. The after end of the barge is tapered to fit into the "wedge" formed by the hulls on the tug on each side, the tug crossover, and the ledges protruding from the hulls. Strips of greenheart wood are placed along the

upper surfaces of the after end of the barge and the ledges protruding from the catamaran hulls. The fit is supplemented with two link arms, extending from the crossover deck to the deck of the barge, that pull the tug and barge units together, as well as with bumper pads between the catamaran hulls and the hull of the barge to prevent transverse motion between the units of the ITB. The contact of the greenheart surfaces with the steel underside of the tug crossover, and with the steel hull of the barge, respectively, generates friction, which, together with other portions of the interconnection system, keep the tug and the barge mated during the voyage. If properly mated, the tug and barge units of an ITB perform as if they were one vessel.

The OXY PRODUCER and her sisterships were only the second generation of catugs constructed, and, at the time, the ITB design was relatively novel. To insure that the ITB concept was properly applied in its vessels, Occidental contracted with Hvide[1], the owner of the catug patent, to supervise construction[2], and with J.J. Henry & Associates, Inc. ("J.J. Henry"), a naval architect, to incorporate the catug design into the vessels' plans and specifications. The vessels were constructed by Avondale Shipyards, Inc. ("Avondale"), a large shipyard in New

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[1] Hvide Marine International, Inc.; Hvide Shipping, Incorporated; and Seabulk Transmarine II, Inc. (hereinafter collectively referred to as "Hvide").

[2] The OXY PRODUCER was also operated by Hvide under charter after its delivery.

Orleans, Louisiana. Each of these parties expressly warranted that, upon delivery, the OXY PRODUCER would be seaworthy.

The OXY PRODUCER and her barge, the OXY 4102, were delivered on June 9, 1981, and made one successful round-trip to the Soviet Union. However, during the second voyage of the ITB, rough weather was encountered, during which relative motion between the tug and the barge developed. The impact of the barge against the catamaran hulls of the tug opened holes which ultimately caused the loss of the OXY PRODUCER.

It was not determined until the conclusion of the recovery action[3] against the parties involved with the construction of the vessel, Avondale, Hvide, and J.J. Henry, among others, that the OXY PRODUCER had been delivered with insufficient greenheart contact between the barge tongue and the tug crossover. While the barge specifications required 85 – 90% contact at this location, at the time of delivery there was virtually none. The tug rested only on "high spots" on the greenheart surfaces. The rough weather encountered on the ITB's second voyage knocked the tug off of these high spots and led to the total decompression of the linkage system. The

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[3] The recovery action was filed by American Underwriters, London Underwriters and Occidental in the United States District Court for the Eastern District of Louisiana. The action sought recovery from the builders of the ITB under theories of maritime tort and breach of contract. Jurisdiction over the tort claim lay in admiralty, 28 U.S.C. § 1333, while the contract claims were cognizable under the Court's pendent jurisdiction. See *Employers Insurance of Wausau v. Suwannee River SPA Lines, Inc.*, 866 F.2d 752, 761, 1990 A.M.C. 447, 460 (5th Cir. 1989).

unseaworthy condition resulting from the improper mating at delivery was the sole cause of the loss. The improper mating was apparent, and had actually been discovered by an employee of the construction supervisor, Hvide, prior to the release of the ITB from the shipyard[4].

Insurance for the OXY PRODUCER ITB had been placed in both the London and American markets prior to the delivery of the vessel. The total insured value of the ITB under the hull policies was $36,000,000.00. The American Underwriters, primarily through Employers Insurance of Wausau, subscribed to 28% of this risk under Policy No. D 707-6/81. The policy was a time hull policy which became effective on June 9, 1981, the date of delivery of the OXY PRODUCER ITB. Since the cause of the loss could not be ascertained during the period following the sinking, the underwriters paid Occidental for a total loss of the ITB under the pair and set clause of this policy, subject to a full reservation of all policy defenses. Appendix at 49. The American Underwriters then joined with Occidental and the London Underwriters in the prosecution of the recovery action.

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[4] Details of the loss and the claims asserted against the builders of the OXY PRODUCER are set forth in the opinions of the District Court and the Fifth Circuit rendered in the recovery action. The District Court opinion is reported only unofficially as *Employers Insurance of Wausau v. Avondale Shipyards, Inc.*, 1986 A.M.C. 2770 (E.D. La. 1986). The opinion of the Court of Appeals is reported as *Employers Insurance of Wausau v. Suwannee River SPA Lines, Inc.*, 866 F.2d 752, 1990 A.M.C. 447 (5th Cir.) *cert. denied* 493 U.S. 820, 110 S.Ct. 77, 107 L.Ed. 2d 43 (1989).

Based upon the final determination of the Courts in the recovery action that the OXY PRODUCER ITB was unseaworthy at the time of delivery, the American Underwriters, upon remand, filed a Cross-Claim against Occidental for the return of the policy proceeds paid under reservation of rights. The American Underwriters claimed that, because the OXY PRODUCER was unseaworthy upon delivery of the vessel by the shipyard, and at the time the policy attached, Occidental had breached the warranty of seaworthiness implied at the inception of the risk. This breach absolutely avoided the policy, with the result that the policy never became effective, and provided no coverage for the loss. As the Cross-Claim concerned rights and liabilities arising out of the hull policy, a maritime contract, the District Court had jurisdiction over the claim in admiralty. 28 U.S.C. § 1333. The Cross-Claim was also ancillary to the recovery action, which was brought under the Court's admiralty and maritime jurisdiction.

Occidental denied any liability for the return of the policy proceeds. It argued, among other grounds[5], that the Cross-Claim was barred by the provisions of a "Standstill Agreement," an Agreement which had been entered into by the parties in July, 1984, and which Occidental contended operated as a waiver of the American Underwriters' reservation of rights; that no warranty of seaworthiness was implied at the inception of the risk underwritten by a time hull policy; that the loss of the OXY PRODUCER was a covered peril under the Liner Negligence Clause of the policy; and that, by virtue of the

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[5] Occidental also asserted various theories of estoppel.

Separate Policy of Insurance Clause, the fault of Hvide, Occidental's co-insured, in mating the tug and barge units of the ITB could not be imputed to Occidental to deny coverage.

The issues raised in the Cross-Claim were submitted to the District Court on Cross-Motions for Summary Judgment, without an evidentiary hearing, and, on September 5, 1991, the court ruled that Occidental's Motion would be granted. The District Court held that an unseaworthy condition existing at the inception of the risk would not avoid a time hull policy unless the assured had knowledge of the condition. The Court concluded that, because Occidental had no actual knowledge of the improper mating of the OXY PRODUCER ITB, the implied warranty of seaworthiness was not breached, and the coverage afforded by the policy became effective. It was also held that the Liner Negligence Provision of the policy[6] provided coverage for the loss[7]. Final judgment dismissing the Cross-Claim with prejudice was entered pursuant to Rule 54(b) of the Federal Rules of Civil Procedure on September 30, 1991. The American Underwriters appealed from this Judgment two days later, on October 2, 1991, pursuant to 28 U.S.C. § 1291.

On appeal, the Fifth Circuit rejected the District Court's reading of the warranty of seaworthiness implied

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[6] The Liner Negligence Clause, together with an Inchmaree provision, are reproduced in the Appendix at pages 69 and 70.

[7] The District Court also ruled that summary judgment was appropriate under the terms of Standstill Agreement and under the "Separate Policy of Insurance Treatment Clause" of the policy, but was reversed on these points by the Court of Appeals. A discussion of these issues is not pertinent to this Petition.

at the inception of the risk, and held that Occidental had breached its obligations under that warranty. However, despite this finding, the Court of Appeals failed to enforce the warranty in accord with settled practice. Under all previous decisions addressing the warranty implied at the inception of the risk, a breach of the warranty avoided the policy and precluded *any* recovery by the Assured[8]. Nevertheless, in spite of this settled rule, the panel went on to find coverage, holding that the Liner Negligence Clause inserted into the policy operated as a waiver of the warranty. The Court was concerned that, if the Liner Negligence Clause were not construed as a waiver, " . . . the insured would effectively be precluded from disclaiming the absolute implied warranty of seaworthiness in the policy itself." Appendix at 43.

A warranty defines the precise limits of the obligations which the insurer undertakes to assume. 12A Appleman, *Insurance Law and Practice* § 7341 at 467-68 n.1; 7 Couch, *Cyclopedia of Insurance Law* § 36:41 at 470-71; see also 2 Arnould, *The Law of Marine Insurance and Average* § 632 at 588-89. Construing the Liner Negligence Clause as a waiver of the implied warranty at the inception fundamentally alters the risks assumed by the American

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[8] See, *D.J. McDuffie, Inc. v. Old Reliable Fire Insurance Co.*, 1979 A.M.C. 595, 600 (E.D. La. 1977), *aff'd*, 608 F.2d 145, 147 (5th Cir. 1979); *Gulfstream Cargo Ltd. v. Reliance Insurance Company*, 409 F.2d 974, 983 (5th Cir. 1969); *McAllister Lighterage Line, Inc. v. Insurance Co. of North America*, 244 F.2d 867, 870-71 (2d Cir. 1957); *Lemar Towing, Inc. v. Fireman's Fund Insurance Company*, 352 F.Supp. 652, 660 (E.D. La. 1972), *aff'd* 471 F.2d 609 (5th Cir. 1973); See also *Kilpatrick Marine Piling v. Fireman's Fund Ins. Co.*, 795 F.2d 940, 945 (11th Cir. 1986).

Underwriters in the OXY PRODUCER policy, and by underwriters under hull policies generally. If the Court is concerned about the ability to disclaim the warranty, there are recognized means to effect that end *without* gutting the implied warranty or distorting the Liner Negligence Clause. Moreover, because the Liner Negligence Clause *is a form of Inchmaree*, a departure from the existing rule is not justified.

The decision of the Fifth Circuit was made on a summary judgment record, devoid of any evidence illustrating alternatives to its ruling and by which its consequences could be judged. If left to stand, the ruling will wreak havoc with established marine insurance law. The decision not only alters the risks assumed in a marine policy, it creates a disincentive for the insured to prepare its vessel for sea, and will promote a rash of litigation in what has been a settled area. Because of the overriding importance of this issue to the insurance industry, this Court's intervention is required.

ARGUMENT

A. A BREACH OF THE WARRANTY IMPLIED AT THE INCEPTION OF THE RISK AVOIDS THE CONTRACT OF INSURANCE

Federal Maritime law implies two warranties of seaworthiness into every time hull policy. Appendix at 26; See also, *Gulfstream Cargo*, 409 F.2d at 983; *L & L Marine Service v. Ins. Co. of North America*, 796 F.2d 1032, 1035 (8th Cir. 1986). The first of these is an absolute warranty that

the vessel *is* seaworthy "as of the very moment of attachment of the insurance." The second warranty, which applies only after the policy attaches, has been deemed a "modified, negative warranty"[9] under which the insured promises not to knowingly send a vessel to sea in an unseaworthy condition. *Id.* Only the first of these warranties is applicable here[10].

The implied warranty of seaworthiness *at the inception of the risk* was derived from, and is the equivalent of, the warranty of seaworthiness implied in voyage policies. Appendix at 37; *Spot Pack*, 1957 A.M.C. at 661, 242 F.2d at 388. It constitutes an absolute undertaking by the assured that the vessel *is seaworthy at the time the insurance policy attaches*. Under this warranty "if the vessel *is in fact unseaworthy* at the time the insurance were to attach, the breach avoids the policy." *Lemar Towing*, 352 F.Supp. at

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[9] See, *Gulfstream*, 409 F.2d at 983 n.26; *Tropical Marine Products, Inc. v. Birmingham Fire Insurance Co. of Pennsylvania*, 247 F.2d 116, 119 (5th Cir. 1957); *Saskatchewan Govt. Ins. Office v. Spot Pack, Inc.*, 242 F.2d 385 (5th Cir. 1957).

[10] *After* the attachment of the policy, the obligations of the assured are reduced to become a "negative, modified warranty" that he "from bad faith or neglect, will not knowingly permit the vessel to break ground in an unseaworthy condition." *Saskatchewan Govt. Ins. Office v. Spot Pack, Inc.*, 1957 A.M.C. 655, 661, 242 F.2d 385, 388 (5th Cir. 1957). This warranty relates only "to defects of seaworthiness which arise *after commencement of the risk*," and is thus inapplicable in this case. *L & L Marine*, 796 F.2d at 1035; see also *Gulfstream*, 409 F.2d at 983 n.26; *Spot Pack*, 242 F.2d at 388 n. 3, 1957 A.M.C. at 661-62 n. 3 (and accompanying text). While a breach of the negative, modified warranty requires knowledge on the part of the assured, a breach of the warranty implied at the inception *does not*. Appendix at 26.

660; See also *Gulfstream*, 409 F.2d at 983, n. 26, *L & L Marine*, 796 F.2d at 1035.

As recognized by the Fifth Circuit, the warranty implied at the inception of a time policy is literal – its breach does not depend on the knowledge or fault of the assured, Appendix at 38, nor can the shipowner avoid the warranty by delegating the work of putting the ship in shape to others. 4A Appleman, *Insurance Law and Practice* § 2654 at 205. The warranty is "*not* a contract that the owner will use diligence to make his vessel seaworthy, but an absolute [undertaking] that she *is* seaworthy, and if broken the policy is made void." *The Caledonia*, 157 U.S. 124, 134, 15 S.Ct. 537, 541, 39 L.Ed. 644 (1895) (emphasis supplied). If the owner is "mistaken in the fact, and the vessel is in fact not seaworthy, the underwriter is not liable," however blameless the assured's conduct may have been. *Id.*

The consequences of a breach of the warranty implied at the inception of the risk are clear. If the vessel is in fact unseaworthy when the policy attaches, the insurance is void, and deemed never to have been effective.

> [The] warranty is strictly a condition precedent to the obligation of insurance; if it be not performed, the policy does not attach; and, if this condition be broken, at the inception of the risk, in any way whatever and from any cause whatever, *there is no contract of insurance, the policy being wholly void.*

Id., 157 U.S. at 131, 15 S.Ct. 537 (emphasis supplied); See also, *McDuffie*, 608 F.2d at 147; *Gulfstream*, 409 F.2d at 983, 983 n.26; *Lemar Towing*, 352 F.Supp. at 660; *Kilpatrick*

Marine, 795 F.2d at 945. Unlike a breach of the negative, modified warranty, failure to satisfy the warranty arising at the inception of the risk relieves the insurer of *any liability* under the policy, including liability under the Inchmaree Clause. *McDuffie*, 608 F.2d at 147, *Gulfstream*, 409 F.2d at 983, 983 n.28; *McAllister*, 244 F.2d at 870-71.

The tug and barge units of the OXY PRODUCER ITB were improperly mated at the time of delivery, and at the attachment of the risk. The Court of Appeals held that Occidental had breached the implied warranty as a matter of law. Appendix at 39. Under settled practice, this determination compels the conclusion that the policy was void and provided no coverage for the loss, even under an additional perils clause, such as the Liner Negligence provision. *McDuffie*, 608 F.2d at 147; *The Natalie*, 1959 A.M.C. 2379, 2390-94 (Arb.); See also, *Gulfstream*, 409 F.2d at 983.

Sound policy reasons justify this result. Hull insurance is an "extraordinary risk." Pritchett, *The Implied Warranty of Seaworthiness in Time Policies: The American View*, [1983] 2 Lloyd's Maritime and Commercial Law Quarterly 195, 208 (hereinafter "Pritchett"). The warranty is intended to take "away all temptation to expose life and property to the dangers of the seas in vessels not fitted to encounter or avoid them." *The Caledonia*, 157 U.S. at 134, 15 S.Ct. at 541. Because the insured has exclusive knowledge and control of the vessel, he, not the insurer, is the party able to ascertain the capabilities of the vessel, and to foresee its intended use during the policy term. Consequently, it is the insured who is in the best, if not the exclusive, position to see that the vessel is adequately prepared. *Id.*; Appendix at 29-30, 38.

Furthermore, given the owner's exclusive knowledge and control, placing the burden of pre-attachment unseaworthiness on him is the most efficient allocation of the risk. The incidence of "defects *in fact undiscoverable* under . . . comparatively ideal pre-[attachment] circumstances [is] low," and the owner is in a position "to contract away the risk in his dealings with suppliers, . . . service companies" and, as in this case, the builders of the vessel. Pritchett at 208 (quoting *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539, 557-8, 80 S.Ct. 926, 936-7, 1960 A.M.C. 1503, 1518 (1960) (Frankfurter, J. dissenting)). In short, the warranty shifts the risk of loss "to the cheapest cost avoider." Appendix at 29. If hull insurance is held to underwrite patent seaworthiness *existing* at the attachment of the policy, as opposed to unseaworthiness *developing* during the policy term, the owner will have no incentive to prepare his vessel properly for sea. Societal costs ultimately will be greatly increased through more numerous casualties and elevated premiums.

The warranty of seaworthiness embodies the foundation upon which the hull policy is written. It has been equated with the principle of *uberrima fides*, or complete candor in disclosing all facts material to the risk. *McDuffie*, 1979 A.M.C. at 598. The warranty remedies the underwriter's lack of particular knowledge of the vessel to be insured, and enables the policy to issue at an affordable premium. Whatever unseaworthiness the underwriter may agree to assume *after* the policy goes into force, at the moment the policy is issued the vessel must be seaworthy and fit to encounter expected perils. *Gulfstream*, 409 F.2d at 983.

Given the fundamental nature of the warranty, the Court should not lightly embark upon a course that would impede the warranty's operation. While the decision of the Appellate Court pays lip-service to the warranty and its underlying policies, it fails to enforce them. Because the Fifth Circuit has departed, without justification, from settled law upholding the warranty, its ruling should be reversed.

B. THE APPELLATE COURT MISCONSTRUED THE EFFECT OF THE LINER NEGLIGENCE CLAUSE

Any decision that the warranty of seaworthiness implied at the inception of the risk has been waived or displaced should be made on a full record, and on a predictable, and justifiable, reading of the policy. Unfortunately, the decision of the Fifth Circuit was based on neither.

A Liner Negligence Clause is a type of Inchmaree provision. Such clauses have consistently been held to be avoided by unseaworthiness existing at attachment in violation of the warranty. See, *McDuffie*, 1979 A.M.C. at 600, *aff'd*, 608 F.2d at 147; *The Natalie*, 1959 A.M.C. at 2390-94. Yet, without any evidence as to industry practice, or as to any intention of the parties to shift the risk of the unseaworthiness of this novel vessel to the underwriters, the Court legislated a black letter rule of law that the Liner Negligence Clause operates as a waiver of the implied warranty. Appendix at 47.

The evident basis for the Court's ruling was its unfounded belief that the Liner Negligence Clause constituted the *only* basis by which the warranty could be

disclaimed in the policy. Appendix at 43. In fact, a mechanism has long existed to accomplish a disclaimer, if a disclaimer is desired. The Court has needlessly upset what has, in practice, been long-settled law. Accordingly, its decision should be reversed.

1. UNDER SETTLED LAW, INCHMAREE PROVISIONS DO NOT UNDERWRITE UNSEAWORTHINESS EXISTING AT THE ATTACHMENT OF THE RISK IN VIOLATION OF THE IMPLIED WARRANTY

All prior decisions addressing the interaction of an additional perils clause with the warranty implied at the inception of the risk have held that, when a breach of this warranty is found, *it becomes unnecessary to reach the question of the coverage that otherwise would have been provided by the clause. McDuffie*, 1979 A.M.C. at 600, *aff'd* 608 F.2d at 147; *The Natalie*, 1959 A.M.C. at 2390-94[11]. While the Appeals Court recognized that an Inchmaree Clause has *not* been deemed to operate as a waiver of the warranty of seaworthiness implied at the inception, Appendix at 45, the Court extended the Liner Negligence Clause to effect such a waiver. There is no basis for this extension in either the language of the clause or in established practice.

The Liner Negligence Clause is a form of Inchmaree provision and should be governed by the same rules.

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[11] It appears that *McDuffie* and *The Natalie* (and the cases collected therein) are the only reported decisions squarely addressing this issue. No cases, other than the current proceeding, have construed the Liner Negligence Clause.

Although the Clause expands the perils insured, see Tetreault, *The Hull Policy: The Inchmaree Clause*, 41 Tul. L. Rev. 325, 334 (1967), it is, in form and function, the same as an Inchmaree. Indeed, the Liner Negligence has been characterized as an "amendment" to the standard Inchmaree provision. *Id.*

A comparison of the two clauses[12] clearly reveals this point. Both clauses insure, among other perils in common, losses caused by breakdown of motor generators or other electrical machinery, bursting of boilers, breaking of shafts, latent defects in machinery or hull, together with various accidents in handling cargo, bunkering or going on or off drydocks. More to the point, both clauses cover loss of the vessel from negligence. The Inchmaree Clause covers loss caused by the negligence of charterers and repairers, provided they are not assured under the policy, as well as loss caused by the negligence of masters, officers, crew and pilots. The Liner Negligence Clause covers loss caused by the negligence of any person. In order to obtain coverage under either clause, the loss must not have resulted from the failure of either the assured, the owner or the manager of the vessel to exercise due diligence. Neither clause expressly extends its negligence covers to include negligence occurring prior to the attachment of the risk, nor does either clause expressly limit its negligence covers to negligence arising only after the policy is issued. There is simply no basis,

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[12] The full texts of the American Institute Inchmaree Clause and of the Liner Negligence Clause are produced at pages 69 and 70 of the Appendix.

on the face of the two clauses alone, to reach the result achieved by the Court of Appeals.

Nor is the decision of the Court of Appeals consistent with established practice. The established treatment of the interaction of the warranty with an additional perils clause is best illustrated by *The Natalie*, which concerned the issue of whether the pre-attachment negligence of a repairer was covered under an Inchmaree Clause. In that case, a repair yard had installed a mismatched stern gland six days *prior* to the insurance of the policy. The gland, which was too large to achieve a proper seal, allowed seawater to enter into the propeller hub void and remain in contact with the shaft. The constant presence of seawater caused the shaft to corrode and eventually fracture. Recovery was denied, in spite of the Inchmaree Clause, on the ground that the vessel was unseaworthy at the attachment of the risk. Commentators have acknowledged this decision to be a correct interpretation of the law. See Leslie J. Buglass, *Marine Insurance and General Average in the United States* at 36 (2d Ed. 1981).

Although *The Natalie* involved an Inchmaree Clause rather than a Liner Negligence Clause, there is no real distinction between that case and the one now before the Court. The improper installation of the stern gland was also apparent upon inspection, and, but for the breach of warranty, would have been as much encompassed by the term "Negligence of Repairers" in *The Natalie's* Inchmaree Clause as the defective mating is contended to be within the negligence cover in the Liner Negligence Clause at issue here. As shown above, neither clause makes any reference to the warranty of seaworthiness implied at the inception of the risk, and neither clause expressly extends

its coverage to a point prior to the attachment of the policy.

The Appellate Court attempted to rationalize its departure from existing law on the ground that the Liner Negligence Clause is broad enough to cover the negligence of the builder or the construction supervisor. Appendix at 46; See also 1 Alex L. Parks, *The Law and Practice of Marine Insurance and Average* at 406 (1987); Leslie J. Buglass, *Marine Insurance and General Average in the United States* at 139 (2d Ed. 1981). However, as illustrated by *The Natalie*, the fact that such negligence would be a covered peril *if the policy attached* does not in any way negate the warranty.

Moreover, extending the Liner Negligence Clause in this case to cover the open, obvious *and discovered* condition of unseaworthiness present in the OXY PRODUCER at the inception of the risk violates fundamental tenets of insurance. Marine hull policies, even those incorporating Liner Negligence provisions, are issued to underwrite *risks, not certainties*. Parks at 404. It was clearly established that the ITB required greenheart contact of 85 to 90% to avoid "sudden decompression of the linkage system." Had the ITB been delivered "with the percentage of contact between the tug and the barge along the greenheart surfaces required by the plans and specifications, *no significant movement would have developed . . .* " *Suwannee River SPA Lines*, 866 F.2d at 769. This condition was ascertainable upon simple measurement, and although discovered by the construction supervisor prior to delivery, was left unremedied. While the Liner Negligence Clause may

cover negligence such as builder's concealed misuse[13] of an otherwise sound component, the clause should not be held to underwrite the open and obvious unseaworthy condition here.

In effect, the Appellate Court's reading of the Liner Negligence Clause converts the American Underwriters' hull policy into a type of coverage foreign to the field of marine hull insurance in this country. Under the Fifth Circuit's reading, the Clause no longer underwrites just *the risk* that unseaworthiness within the Liner Negligence Clause would develop during the policy term; instead, that reading would have the insurer cover the necessary and certain consequences of *known deviations* from crucial construction specifications. There was no evidence demonstrating that this type of coverage is ever effected through a Liner Negligence Clause, nor is there any basis on the present record to reform the Liner Negligence Clause to underwrite such a risk.

Under existing practice, a breach of the warranty implied at the inception absolutely avoids coverage under the policy, *Gulfstream*, 409 F.2d at 983, including coverage that otherwise would have been provided by an additional perils clause, such as the Liner Negligence Clause at issue here. *McDuffie*, 1979 A.M.C. at 600, *aff'd*

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[13] See e.g. *Irwin v. Eagle Star Insurance Company*, 455 F.2d 827, 1973 A.M.C. 1184 (5th Cir. 1972) where the manufacture misused a sound iron nipple between two brass fittings in vessel piping below the waterline. The iron nipple corroded allowing water to enter the hull and sink the vessel. Because the nipple was not defective, only misused, the loss was not covered as a latent defect under the Inchmaree.

608 F.2d at 147; *The Natalie*, 1959 A.M.C. at 2390-94. The Appellate Court's construction of the Liner Negligence Clause as a waiver of the warranty of seaworthiness implied at the inception of the policy rests on no compelling differences between the Inchmaree and Liner Negligence Clauses, and is reconcilable with neither existing law nor the scope of risks generally underwritten by marine hull insurance. The decision should not be permitted to stand.

2. THERE ARE MEANS TO WAIVE THE WARRANTY AT INCEPTION UNAMBIGUOUSLY WITHOUT DISTORTING THE LINER NEGLIGENCE CLAUSE

In its opinion, the panel conceded that the approach illustrated by *The Natalie*, and advanced by the American Underwriters, has logic, but the Court held that the rule of the case was too "drastic" for adoption. "If we were to adopt [this] reasoning, the insured would effectively be precluded from disclaiming the absolute implied warranty of seaworthiness in the policy itself." Appendix at 43. This assumption is unwarranted. There *are* recognized means for the assured to disclaim the absolute warranty in the policy without distorting the scope of the Liner Negligence Clause.

Albeit for an additional premium, seaworthiness of the OXY PRODUCER ITB at the inception of the risk could have been admitted through the use of a "Seaworthiness Admitted" Clause. Typically, such a Clause provides simply that: "The seaworthiness of the vessel as between the assured and assurers is admitted."

Unlike the Liner Negligence Clause, a Seaworthiness Admitted Clause operates as an unambiguous waiver of the warranty at inception. The Clause serves as a declaration that the warranty has been fulfilled, and shifts to the underwriter the risk of any loss of the vessel that might ultimately be caused by an unseaworthy condition present at the time the policy attached. See *Clinchfield Fuel Co. v. Aetna Ins. Co. (The Northwestern)*, 121 S.C. 305, 114 S.E. 543, 1923 A.M.C. 1, 10-11 (1922) (cargo policy); R.J. Lambeth, *Templeman on Marine Insurance: Its Principles and Practice* at 47-8 (6th Ed. 1986). The Clause requires the insured to identify the nature of the risk, and to disclose those conditions of unseaworthiness actually known to him, but thereafter, *it is up to the underwriter*, if further information as to the condition of the vessel is desired, to make appropriate inquiries. If the underwriter chooses not to investigate the risk, and issues the policy, it bears the risk of loss caused by any unseaworthiness present at attachment. *Id.*, *Templeman* at 47-8.

The OXY PRODUCER was not an everyday merchant vessel. It was an adaption of an unique concept to meet Occidental's specialized needs. There was no evidence that the American Underwriters knew anything about ITBs prior to underwriting the risk, or that they had periodically inspected the progress of the construction as would have been consistent with an intent to admit seaworthiness at the inception of the risk. By contrast, the evidence is clear that Occidental entered into a series of contracts with a naval architect, a construction supervisor, and a shipyard to transform the ITB from blueprint to functioning vessel. Each of these parties was in a position not only to assess the nature of the risk of

unseaworthiness, but also to insure that the vessel was sound. Indeed, each of these parties warranted that the OXY PRODUCER ITB would be seaworthy upon delivery. This allocation of the risk of unseaworthiness arising prior to the attachment of the insurance to the parties most able to prevent the condition is precisely the result encouraged by the policies supporting the implied warranty.

To hold on this record that the American Underwriters assumed the risk of known deviation from the plans and specifications of the novel ITB design defies logic. To distort the construction of the Liner Negligence Clause simply to create a vehicle to disclaim the warranty implied at the inception of the policy is unconscionable. A recognized method to disclaim the warranty already exists through the Seaworthiness Admitted Clause, a provision which clearly and unambiguously shifts to the underwriter the obligation to determine the fitness of the vessel at attachment.

Summary judgment is a remedy that should be used only with caution. If the Court is to extend the Liner Negligence Clause beyond the usual realm of additional perils clauses, and legislate a disclaimer remedy, it should only do so on a full record. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S.Ct. 2505, 2513, 91 L.Ed. 2d 202 (1986); See also, *Kennedy v. Silas Mason Co.*, 334 U.S. 249, 68 S.Ct. 1031, 92 L.Ed. 1347 (1948); 6 *Moore's Federal Practice* § 56.16 at 56-353 (2d. Ed. 1993). Settled practice concerning the interaction of the warranty and additional perils provisions should not be placed in upheaval unnecessarily in a misguided effort to achieve what is *already available* through the Seaworthiness Admitted Clause.

CONCLUSION

The Appellate Court erred in failing to enforce the implied warranty and in departing from the settled construction applied to additional perils clauses in the past. The Liner Negligence Clause evolved from the Inchmaree provision, and, in form and function, remains virtually the same. Decisions construing the Inchmaree Clause have held that a breach of the warranty of seaworthiness implied at the inception of the risk avoids the policy, and absolves the underwriter of any liability under its terms. Giving precedence to the warranty, particularly where, as here, the unseaworthy condition was discovered, reinforces the primary purpose of the warranty, to provide an incentive for the assured to prepare the vessel properly for sea, and protects the integrity of the insurer's underwriting process.

Furthermore, there are recognized means to accomplish a waiver of the warranty at the inception, if the parties desire that the warranty be disclaimed. The Liner Negligence Clause should not be transformed, as a matter of law, into a provision waiving the warranty, without a full record of the effects of that course to inform the Court's decision.

The decision of the Fifth Circuit adversely impacts settled marine insurance practice. If left to stand, the decision will greatly affect the cost of additional perils coverage, if not its availability. Under no circumstances should this practice be altered on the record of this case. At the very least, the case should have been remanded to the District Court to permit the taking of evidence on the Seaworthiness Admitted Clause and the impact on the industry of any extension of the Liner Negligence Clause

to open and discovered defects of unseaworthiness present at the attachment of the policy. Due to the overriding importance of this issued to the marine insurance industry, the intervention of this Court is required.

Respectfully submitted,

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APPENDIX

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EMPLOYERS INSURANCE OF WAUSAU, in its own right, and as Representative of Those Certain American Underwriters Subscribing to Certificate No. 14880, Etc., et al., Plaintiffs-Appellants,

v.

OCCIDENTAL PETROLEUM CORPORATION, et al., Plaintiffs-Appellees,

v.

AVONDALE SHIPYARDS, INC., et al., Defendants.

OCCIDENTAL PETROLEUM CORPORATION, et al., Plaintiffs,

v.

AVONDALE SHIPYARDS, INC., et al., Defendants.

No. 91-3855.

United States Court of Appeals, Fifth Circuit.

Dec. 10, 1992.

Insured vessel owner and insurers brought suit against manufacturer, construction supervisor, shipbuilder, and others, arising from sinking of vessel. After remand, 866 F.2d 752, insurers filed cross claim against owner, seeking to recover proceeds paid reservation of rights. Owner's motion for summary judgment was granted by the United States District Court for the Eastern District of Louisiana, A.J. McNamara, J., and insurers

appealed. The Court of Appeals, King, Circuit Judge, held that: (1) warranty of seaworthiness implied at inception of time hull policy is absolute in nature, but (2) "Liner Negligence Clause" effectively provided coverage for unseaworthiness that caused sinking of vessel, and thus waived or displaced absolute warranty of seaworthiness implied at inception of time hull policy.

Affirmed.

1. Federal Courts 612

Because choice of law was not raised below and no manifest injustice would arise in refusing to decide issue for purpose of interpretation of "Standstill Agreement" between plaintiffs in suit arising from sinking of vessel, issue would not be addressed on appeal.

2. Federal Courts 776

Conclusion that contract is unambiguous is question of law, and district court's determination is reviewed de novo.

3. Federal Civil Procedure 2492

"Standstill Agreement" between owner of vessel that sank and underwriters, which were all plaintiffs in suit against shipbuilder, vessel architect, and others, was ambiguous as to whether paragraphs in question represented broad waiver of rights as to each other with narrow reservation, or broad reservation of rights with narrow waiver, precluding summary judgment in favor of owner on basis that claim against it by insurers was

barred by such agreement; parties agreed not to assert any cause of action against each other with respect to subject matter of consolidated actions but did not indicate whether cross claim was included within terms of that clause.

4. Insurance 415

Two warranties of seaworthiness are recognized in time hull insurance policy, the implied warranty of seaworthiness at inception of policy which is absolute in nature, and a second warranty, applying only after the policy attached, which is a modified, negative warranty obligating insured not to knowingly send vessel to sea in unseaworthy condition.

5. Insurance 178

"Voyage policies" insure vessel for single voyage, whatever the duration, while "time policies" insure vessel for unspecified number of voyages during specified duration.

See publication Words and Phrases for other judicial constructions and definitions.

6. Insurance 415

Insured vessel owner's warranty of seaworthiness implied at inception of time hull policy is absolute in nature, and insurer need not demonstrate that insured had knowledge of unseaworthy condition of vessel or that insured was somehow at fault in not discovering

unseaworthy condition; it is enough to discharge insurer if vessel is in fact not seaworthy at inception of policy.

7. Insurance 417.1

Absent some waiver by insured vessel owner of implied warranty of seaworthiness at inception to time hull insurers, district court's finding that vessel was improperly mated and unseaworthy on delivery to owner demonstrated as a matter of law that insured owner did not comply with absolute warranty.

8. Insurance 416

"Inchmaree Clause" affords coverage for certain perils that are not included within classic perils clause to broaden coverage under marine insurance policy, and typical clause covers loss of or damage to vessel caused directly by latent defects in machinery or hull or by operational negligence on part of certain individuals.

See publication Words and Phrases for other judicial constructions and definitions.

9. Insurance 416

"Liner Negligence Clause" in marine insurance policy provides even broader coverage than standard Inchmaree Clause.

See publication Words and Phrases for other judicial constructions and definitions.

10. Insurance 415

In determining extent to which clause in time hull policies supersedes or waives implied warranty of seaworthiness, court should look to language of provision to see if it unambiguously covers risks which would ordinarily be excluded by breach of implied warranty of seaworthiness; if clause does cover such a risk, then clause underwrites that particular type of unseaworthiness.

11. Insurance 416

"Liner Negligence Clause" of marine policy unambiguously covered negligence of construction supervisor and negligence of shipbuilder which were found to cause sinking of vessel, and thus waived or displaced absolute warranty of seaworthiness implied at inception of time hull policy; there was no claim that owner was itself somehow responsible for vessel's unseaworthy condition, construction supervisor was not an agent of owner, but was instead independent contractor, and there was no indication that loss of vessel was caused by any lack of due diligence on part of manager of vessel.

12. Insurance 415

"Separate Policy Clause" in time hull policy issued to owner of vessel did not displace or waive implied warranty of seaworthiness at inception of risk; while such clause affected operation of "Liner Negligence Clause," by itself it neither displaced nor changed terms of implied warranty.

Appeals from the United States District Court for the Eastern District of Louisiana.

Before VAN GRAAFEILAND,* KING, and EMILIO M. GARZA, Circuit Judges.

KING, Circuit Judge:

Plaintiff-Appellant Employers Insurance of Wausau ("Wausau"), in its own right and as representative of certain American Underwriters,[1] filed a cross-claim against Plaintiff-Appellee Occidental Petroleum Corporation ("Occidental"), seeking to recover marine insurance policy proceeds paid to Occidental in 1982 under a reservation of rights. Occidental moved for summary judgment. The district court granted the motion and dismissed Wausau's cross-claim with prejudice. Wausau now appeals the district court's order granting summary judgment. For the following reasons, we affirm the judgment of the district court.

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* Senior Circuit Judge, of the Second Circuit, sitting by designation.

[1] Wausau filed suit on behalf of the following American Underwriters subscribing to Certificate No. 14880, a time hull insurance policy: Chiyoda Fire and Marine Insurance Company; Rochdale Insurance Company; Unigard Mutual Insurance Company; Unione Italiana Reinsurance of America; United Americas Insurance Company; The Netherlands Insurance Company; United States Fidelity & Guaranty Company; and Inland Underwriters Insurance Agency.

I. BACKGROUND

This insurance dispute arises from the sinking of the Oxy Producer, the tug unit of the Oxy Producer ITB,[2] on September 20, 1981. Events occurring before and after this date, however, are relevant to our disposition of the case. Accordingly, we recount the events leading up to and following the sinking of the Oxy Producer.

A. Events Preceding the Sinking of the Oxy Producer

After agreeing to manufacture, sell, and transport superphosphoric acid to the Soviet Union in the early 1970's, Occidental arranged for the construction of three catamaran ITBs. Numerous parties were involved in the construction project. Occidental first retained Hvide Marine International, Inc. ("Hvide") to supervise the design and construction of the vessels. Hvide, in turn, contracted with a naval architectural firm, J.J. Henry Co. ("Henry"), to prepare the plans and specifications for the vessels. After Hvide assigned the architectural contract with Henry to Occidental, Occidental engaged Avondale Shipyards, Inc. ("Avondale") to construct the vessels. Avondale thereafter subcontracted with Victoria Machine Works, Inc. ("Victoria") to manufacture the bumper pads for the vessels' catug interconnection system.

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[2] The Oxy Producer ITB was a catamaran integrated tug barge vessel. According to Wausau, such vessels are composed of a tug and a barge that are "mated" through an interconnection system. Thus, the Oxy Producer ITB consisted of the Oxy Producer (the tug) and the Oxy 4102 (the barge).

Before construction of the three ITBs was finished, Occidental and Hvide obtained insurance for the vessels in the American and London markets. The unit of the vessel at issue in this case, the Oxy Producer, was insured under Certificate No. 14880, a time policy of hull and machinery insurance. The policy was to become effective on the date that the Oxy Producer ITB was delivered. The agreed-upon value of the Oxy Producer under this policy was $36,000,000. The American Underwriters, primarily through Wausau, subscribed to 28% of the risk under the policy.

B. Events Surrounding the Sinking of the Oxy Producer

The Oxy Producer ITB was delivered to Occidental on June 9, 1981, and thereafter made one successful trip to the Soviet Union. However, on its second trip to the Soviet Union – in September 1981 – the Oxy Producer ITB ran into rough weather, which caused substantial movement between the Oxy Producer (the tug unit of the vessel) and the Oxy 4102 (the barge unit of the vessel). Ultimately, the movement of the barge unit against the Oxy Producer opened holes in the hulls of the tug and caused it to sink.[3]

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[3] For a more detailed description of the events leading up to the sinking of the Oxy Producer, see *Employers Insurance of Wausau v. Suwannee River Spa Lines, Inc.*, 866 F.2d 752, 756 (5th Cir.), *cert. denied*, 493 U.S. 820, 110 S.Ct. 77, 107 L.Ed.2d 43 (1989).

C. Events Surrounding the First Lawsuit

Shortly after the Oxy Producer sank, Wausau, on behalf of the American and London Underwriters, began investigating the loss. When the investigation moved too slowly for Occidental, it pressured the underwriters to pay the claim. To avoid jeopardizing any subrogation rights through litigation with the insured, the underwriters decided to pay the claim – but only under a reservation of all policy defenses.

After the underwriters paid the claim under the time hull insurance policy, they and Occidental filed suit against the various parties involved in constructing the Oxy Producer ITB. The underwriters and Occidental argued that Henry was liable for the loss because of its role in preparing the plans and specifications for the vessel. Avondale was liable, the underwriters and Occidental contended, for not following the architectural plans and for using defective bumper pads in constructing the vessel. Because it supplied the allegedly defective bumper pads, Victoria was also named as a defendant. And finally, the underwriters and Occidental sued Hvide for its role in supervising the construction of the Oxy Producer ITB.

On July 23, 1984, almost two years after the sinking of the Oxy Producer, Occidental, the American Underwriters, and Hvide executed a "Standstill Agreement."[4] The general purpose of this agreement is undisputed: it was

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[4] The London Underwriters were not a party to the Standstill Agreement because they had, by this time, already waived their reservation of policy defenses.

to allow Occidental, the American Underwriters, and Hvide to present a united front against Henry, Avondale, and Victoria in the already pending lawsuit.[5] The agreement limited the types of claims that would be advanced in the pending action against Henry, Avondale, Victoria, and Hvide. The agreement also discussed the types of claims that could be asserted among the three parties in a subsequent action. The meaning and effect of the agreement on the latter subject, however, is the subject of considerable dispute. *See infra* Part III.

The lawsuit against Henry, Avondale, Victoria, and Hvide finally proceeded to trial in 1986. After a three-month bench trial on the issue of liability, the district court concluded that the sinking of the Oxy Producer was caused solely by improper mating of the vessel and that therefore the vessel was unseaworthy on delivery. The only parties found liable for the improper mating were Avondale and Hvide. The district court found that Avondale was negligent in performing its construction contract[6] and that Avondale had breached the contract and its express warranty of seaworthiness. Hvide, according

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[5] One of the reasons that Occidental wanted to enter into the Standstill Agreement, according to Wausau, is because Occidental previously had agreed to indemnify Hvide for claims arising out of Hvide's operation of the vessel. In its brief on appeal Wausau states: "Occidental expressed concern [at the time the Standstill Agreement was executed] that it would, in effect, lose its recovery for the OXY PRODUCER in the event of any negligence of Hvide by operation of the indemnity agreement."

[6] Although the district court found that Avondale had been negligent in performing its construction contract, the court also found that the contract effectively disclaimed tort liability.

to the district court, had breached its supervision agreement with Occidental, had breached its warranty that the plans for the vessel would assure its seaworthiness, and finally, had been negligent in supervising the mating of the vessel. Both Henry and Victoria were dismissed from the suit, because the district court found that they were in no way responsible for the improper mating of the vessel.

On appeal of the first lawsuit, we affirmed the district court's holdings that the vessel was improperly mated and unseaworthy on delivery and that this condition alone caused the Oxy Producer to sink. We reversed the district court's dismissal of claims against Henry and Victoria, however, as being premature. Finally, we remanded the case for a determination of damages in a manner consistent with our opinion. *See Employers Ins. of Wausau v. Suwannee River Spa Lines, Inc.* 866 F.2d 752, 755 (5th Cir.), *cert. denied*, 493 U.S. 820, 110 S.Ct. 77, 107 L.Ed.2d 43 (1989).

D. Wausau's Cross-Claim for the Return of Insurance Proceeds

On remand, Wausau filed a cross-claim against Occidental on behalf of the American Underwriters, seeking recovery of the proceeds paid to Occidental under a reservation of rights. In this cross-claim, Wausau asserted that, because the Oxy Producer ITB was unseaworthy at delivery, Occidental breached the warranty of seaworthiness implied at the inception of the time hull policy. Wausau reasoned that Occidental's breach of the implied

warranty of seaworthiness at the inception of risk prevented the time hull policy, under which Occidental had claimed the proceeds, from attaching.

Occidental moved for summary judgment, asserting that there were no genuine issues of material fact and that Wausau's cross-claim was barred as a matter of law. In support of its motion, Occidental advanced numerous arguments. Occidental first argued that the Standstill Agreement between Occidental, Hvide, and Wausau expressly precludes the cross-claim. Occidental also contended that, under a time hull policy like the one issued to Occidental, there is no absolute implied warranty of seaworthiness at the inception of coverage. Occidental further maintained that, even if there is such an absolute warranty implied at the inception of coverage, its particular time hull policy – through the Liner Negligence Clause and the Separate Policy of Insurance Treatment Clause – nonetheless provides coverage for the loss incurred in this case. Occidental finally argued that Wausau and the American Underwriters had waived or are estopped from asserting their right to seek recovery of the insurance proceeds.

The district court agreed with at least three of Occidental's arguments, and therefore granted summary judgment in Occidental's favor. As one ground for granting summary judgment, the district court relied on the "clear and unambiguous" language of the Standstill Agreement, which it held bars Wausau's cross-claim as a matter of law. The district court also held that the Liner Negligence Clause in the insurance policy supported summary judgment in Occidental's favor. In particular,

the district court reasoned that the due diligence provision in the Liner Negligence Clause displaces any implied warranty of seaworthiness at the inception of risk. As a third ground for granting summary judgment, the district court cited the Separate Policy of Insurance Treatment Clause in the insurance policy. This clause, in the district court's view, provides an additional basis for coverage of Occidental's loss. Wausau thereafter filed a timely notice of appeal from the district court's order granting summary judgment in favor of Occidental.

II. STANDARD AND SCOPE OF REVIEW

In reviewing a summary judgment, we apply the same standard as the district court. *Waltman v. International Paper Co.*, 875 F.2d 468, 474 (5th Cir.1989). We ask specifically whether "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED.R.CIV.P 56(c). In answering the first part of this question, we view all evidence and the inferences to be drawn from the evidence in the light most favorable to the party opposing the motion. *Marshall v. Victoria Transp. Co.*, 603 F.2d 1122, 1123 (5th Cir.1979) (citing *United States v. Diebold, Inc.*, 369 U.S. 654, 82 S.Ct. 993, 8 L.Ed.2d 176 (1962)). Questions of law, on the other hand, are subject to de novo review. *Netto v. Amtrak*, 863 F.2d 1210, 1212 (5th Cir.1989).

In our review of a district court's decision to grant a motion for summary judgment, we will affirm that decision if, after examining the entire record, we are convinced that the standard set forth in Federal Rule of Civil Procedure 56(c) has been met. *See id.* Where, as here, the movant for summary judgment advanced several independent arguments in district court in support of its motion for summary judgment, we will affirm if any of those grounds support the district court's decision. Thus, in our review of the district court's grant of summary judgment in favor of Occidental, we are not bound to the grounds articulated by the district court; instead, we may affirm the district court's judgment on other appropriate grounds. *See Coral Petroleum, Inc. v. Banque Paribas-London*, 797 F.2d 1351, 1355 n.3 (5th Cir.1986) (citing *Davis v. Liberty Mut. Ins. Co.*, 525 F.2d 1204, 1207 (5th Cir.1976)).

III. EFFECT OF THE STANDSTILL AGREEMENT

One of the grounds relied on by the district court in granting summary judgment is the language of the Standstill Agreement ("SSA"). The district court held that the unambiguous language of the SSA prohibits Wausau's cross-claim against Occidental. Wausau argues that the district court erred in its interpretation of the SSA. In particular, Wausau argues that (a) the SSA permits the cross-claim as a matter of law, or (b) because the language of the SSA is ambiguous, there is a fact issue about whether the parties intended to allow such a cross-claim. For the following reasons, we agree with Wausau's latter argument and accordingly hold that the district court erred in granting summary judgment on the basis of language in the SSA.

A. Relevant Provisions of the SSA

The SSA, which was executed prior to the first lawsuit, was a three-party agreement between the American Underwriters (who were represented by Wausau), Occidental, and Hvide. The purpose of the agreement, according to the district court, was to allow the parties "to present a united front in the recovery effort against the various defendants in the consolidated actions." Less than a model of clarity, the SSA provides, in paragraphs one through four:

> 1. This Agreement shall not apply to any cause of action currently being asserted by the [American] Underwriters, London Underwriters and/or [Occidental] against HVIDE in the consolidated actions referred to above regarding Predelivery Acts[7] as presently stated and as the same may be amended; provided, that, such amendments are not inconsistent with this Agreement.
>
> 2. For purposes of the Agreement, a "Subsequent Proceeding" is defined as any mechanism or process for the resolution of claims or disputes which is commenced after the consolidated actions have been finally determined, including appeals thereof. [Wausau], [Occidental] and HVIDE agree not to be bound in any Subsequent Proceeding by any finding of fact or decision of law in the consolidated actions

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[7] The SSA defines "Pre-delivery Acts" as those acts concerning (a) the design and construction of the vessels, (b) the review and approval of technical information, (c) the review and approval of working plans and drawings, (d) the review and inspection of construction of the vessels and their components, and (e) the preparation of the vessels for operation.

which would otherwise be binding upon them under the principles of *res judicata*, collateral estoppel, law of the case or other legal or equitable doctrine with respect to any claims which may be asserted pursuant to paragraph 4 below nor shall such findings of fact or decision of law be admissible for any purpose in any Subsequent Proceeding.

3. The recovery of OXY and the [American] Underwriters and London Underwriters against the defendants in the OXY PRODUCER Action shall be limited to the amounts that may be adjudged recoverable from any or all defendants reduced by any amount HVIDE may be adjudged liable to any co-defendant or plaintiff, by way of contribution or otherwise (a net recovery) arising from any act or failure to act other than a Pre-Delivery Act. In consideration thereof, HVIDE agrees to discontinue without prejudice all the HVIDE Counterclaims; [Occidental] and [Wausau] agree not to assert any additional causes of action in the consolidated actions against HVIDE with respect to the operation of the Vessels; and [Wausau] and [Occidental] agree not to assert any cause of action, except as permitted by paragraph 4 below, against each other with respect to the subject matter of the consolidated actions.

4. In the event that the United States Court in the OXY PRODUCER Action finally determines, including appeals, that there was a want of due diligence of HVIDE as manager of the vessel OXY PRODUCER/OXY 4102 under the so-called Liner Negligence clause of the aforementioned policies and that the recovery of the [American]

> Underwriters is reduced by an amount exceeding 20% of the amounts covered and paid under said Hull and Machinery and Increased Value policies on account of said want of due diligence ("Failure of Due Diligence Holding"), then [Wausau] may, on behalf of said [American] Underwriters, seek the recovery in a Subsequent Proceeding of any amounts not recovered on account of said want of due diligence. If no such Failure of Due Diligence Holding is finally made by the Court then no Subsequent Proceeding shall be instituted or permitted by the United States Underwriters. Each party hereto agrees, subject to paragraph 2 above and to this paragraph 4, that in any Subsequent Proceeding all substantive or procedural rights, remedies, claims or defenses they may have as of the date hereof may be asserted, except that each agrees that any defense of any applicable statute of limitations will be tolled with respect to such rights, remedies, claims or defenses and each agrees to hereby waive any defense of laches or other legal or equitable defense based on the lapse of time.
>
> Except as may be limited hereby, it is the intent that the parties hereto shall be left free to pursue in a Subsequent Proceeding wheatever [sic] rights they may have as of the date hereof.

B. Parties' Interpretations of the SSA

Not surprisingly, Occidental and Wausau offer different interpretations of the SSA. Occidental, citing the last sentence in paragraph three and the first two sentences in paragraph four, interprets the SSA as a broad waiver of the underwriters' prior reservation of rights. Wausau, on

the other hand, focusing on the entire SSA, reads the agreement as a "broad reservation of rights which expressly permits the American Underwriters to assert all policy defenses, including breach of the implied warranty of seaworthiness at the inception of the risk." Occidental and Wausau disagree specifically about the meaning of paragraphs three and four of the SSA.

1. *Occidental's "Broad Waiver" Interpretation*

Occidental argues that, under the unambiguous language of the SSA, every "cause of action not specifically reserved therein" was effectively waived. Occidental then points to the fact that Wausau and the American Underwriters did not specifically reserve their right to bring a cross-claim against Occidental for breach of the implied warranty of seaworthiness at the inception of the policy. Occidental therefore reasons that they waived that right by executing the SSA.

In support of its interpretation that the SSA constituted a broad waiver of claims not specifically reserved in the agreement, Occidental primarily relies on language in paragraphs three and four. The significant language in paragraph three, in Occidental's view, is the last clause, which reads: "[Wausau] and [Occidental] agree not to assert *any* cause of action, *except as permitted by paragraph 4 below,* against each other with respect to the subject matter of the consolidated actions." Occidental argues that this language clearly indicates that paragraph four is an exception to a broad waiver of claims by Wausau and the American Underwriters. The crucial language in paragraph four, Occidental contends, is contained in the first

two sentences. The first sentence of paragraph four specifically allows Wausau and the American Underwriters to bring a claim against Occidental if there is a "Failure of Due Diligence Holding" – i.e., if (i) Hvide is found negligent in managing the Oxy Producer ITB and (ii) because of Hvide's post-delivery negligence, the American Underwriters could not recover at least 80% of the money they had paid in settlement of the claim. The second sentence of paragraph four states that "[i]f no such Failure of Due Diligence Holding is finally made by the Court then no Subsequent Proceeding shall be instituted or permitted by the [American] Underwriters." These two sentences in paragraph four, according to Occidental, evince a waiver of any right held by Wausau and the other American Underwriters to bring a claim for breach of implied warranty of seaworthiness.

Occidental also relies on paragraph one of the SSA to support its waiver interpretation. In that paragraph, Occidental argues, Wausau and the American Underwriters specifically reserved the right to proceed against Hvide for pre-delivery acts. Because Wausau and the American Underwriters did not make a similar reservation with regard to their right to proceed against Occidental for pre-delivery acts, the argument goes, the SSA demonstrates that Wausau and the American Underwriters intended to waive that right.

2. *Wausau's "Broad Reservation" Interpretation*

Wausau interprets the SSA as an agreement in which it and the other American Underwriters made a broad reservation of rights. Paragraphs three and four, Wausau

argues, do not constitute a broad waiver of rights, but a narrow exception to the American Underwriters' broad reservation of rights. Wausau further contends that, because the narrow waiver in those paragraphs was not triggered by a "Failure of Due Diligence Holding," those paragraphs have no bearing on the right of the American Underwriters to bring this cross-claim. In short, Wausau views the SSA as expressly permitting the cross-claim against Occidental.

Wausau first relies on the language of the SSA to support its "broad reservation" interpretation of the SSA. Wausau points specifically to the last two sentences in paragraph four of the agreement. The penultimate sentence in paragraph four reads as follows:

> Each party hereto agrees, subject to paragraph 2 above and to this paragraph 4, that in any Subsequent Proceeding all substantive or procedural rights, remedies, claims or defenses they may have as of the date hereof may be asserted, except that each agrees that any defense of any applicable statute of limitations will be tolled with respect to such rights, remedies, claims or defenses and each agrees to hereby waive any defense of laches or other legal or equitable defense based upon the lapse of time.

Wausau argues that if Occidental's interpretation prevails, the sentence just quoted is rendered meaningless. In its brief, Wausau emphasizes that "[i]f the only substantive basis [the] American Underwriters had to recover the policy proceeds was Hvide's managerial negligence, this savings provision would be absolutely unnecessary." Wausau also points to the last sentence of

paragraph four, which provides: "Except as may be limited hereby, it is the intent that the parties hereto shall be left free to pursue in a Subsequent Proceeding wheatever [sic] rights they may have as of the date hereof." The first clause of the sentence, Wausau argues, demonstrates that the parties intended the limitation in paragraph four – the same limitation relied on by Occidental to demonstrate a broad waiver of rights – to be an *exception* to a broad reservation of rights by Wausau and the other American Underwriters.

Wausau also relied on the SSA's broader purpose, which was to maintain a united front among the plaintiffs in the recovery action against Avondale, Henry, Victoria, and Hvide, to support its interpretation of the SSA. According to Wausau, "The united front was created and maintained by requiring the American Underwriters to 'stand still' in the prosecution of policy defenses that would blunt or undermine the recovery action." Wausau further maintains that "it is inconceivable that an agreement that became known by all parties at 'the Standstill Agreement,' could, in fact, be a waiver of all policy defenses by the American Underwriters." Thus, under Wausau's reading of the SSA, because there is no express waiver of the American Underwriters' right to bring this cross-claim, the SSA permits the action as a matter of law.

C. Appropriateness of the District Court's Interpretation of the SSA

[1] The district court, relying on our decision in *Freeman v. Continental Gin Co.*, 381 F.2d 459 (5th

Cir.1967),[8] adopted the interpretation of the SSA advanced by Occidental and held that the language of

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[8] We note that the district court technically may have applied the wrong law to this contract interpretation question. The case relied on by the district court in its discussion of the SSA – *Freeman v. Continental Gin Co.*, 381 F.2d 459 (5th Cir.1967) – is a diversity case in which Mississippi contract principles governed. The state of Mississippi has no connection to the contract at issue here – a contract which (1) was executed in Louisiana, (2) related to litigation that was pending in federal district court in Louisiana, and (3) is now being construed to bar an insurer's right to recover proceeds paid under a marine insurance policy issued in Florida.

In addition, there is some question as to whether state or federal law should govern the interpretation of the SSA. If the SSA does not implicate maritime concerns, then state law would govern the interpretation question. *See Erie R. Co. v. Tompkins*, 304 U.S. 64, 78, 58 S.Ct. 817, 822, 82 L.Ed. 1188 (1938); *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496, 61 S.Ct. 1020, 1021, 85 L.Ed. 1477 (1941). If the SSA is considered a maritime contract, however, its construction would "normally [be] governed by federal rather than state law." *M.O.N.T. Boat Rental Servs. v. Union Oil Co. of Cal.*, 613 F.2d 576, 579 n.6 (5th Cir.1980) (citing *Halliburton Co. v. Norton Drilling Co.*, 302 F.2d 431 (5th Cir.1962), *cert. denied*, 374 U.S. 829, 83 S.Ct. 1870, 10 L.Ed.2d 1052 (1963); *see also Kenney v. Trinidad Corp.*, 349 F.2d 832, 834 (5th Cir.1965) ("It is clear that in an admiralty case the Court is not bound by *Erie* and *Klaxon*"), *cert. denied*, 382 U.S. 1030, 86 S.Ct. 652, 15 L.Ed.2d 542 (1966), *But cf. Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310, 321, 75 S.Ct. 368, 374, 99 L.Ed. 337 (1955) (recognizing that, although marine insurance contracts are maritime in nature, courts construing such contracts should look to state law where there is no well-established federal rule on the particular point in question).

We need not resolve this choice of law issue on appeal, however, because it has been virtually ignored by the parties. In

that agreement bars Wausau's cross-claim as a matter of law. The district court first found the language in the SSA to be "clear and unambiguous." The district court further found that Wausau and the American Underwriters waived their "right to bring this cross[-]claim unless there was a finding by the court in the liability action that there was a lack of due diligence on the part of HVIDE, as manager of the vessel." Because no such lack of due

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the district court, Occidental cited numerous federal cases applying state contract principles to argue for its interpretation of the SSA. *See, e.g., Tokio Marine & Fire Ins. Co. v. McDonnell Douglas Corp.*, 617 F.2d 936, 940 (2d Cir.1980) (applying California law); *Howard v. Russell Stover Candies, Inc.*, 649 F.2d 620, 623 (8th Cir.1981) (applying Missouri law). Wausau, in its reply to Occidental's motion for summary judgment, cited 18 COUCH ON INSURANCE 2d § 71:46, to support its interpretation of the SSA. On appeal, Wausau now notes in its brief that "[t]here was some dispute below as to what law should apply," but argues that either New York or Florida law should govern the interpretation of the SSA. Occidental, conversely, cites no law in its briefing on the meaning and effect of the SSA.

We stated in *Kucel v. Walter E. Heller & Co.*, 813 F.2d 67, 74 (5th Cir.1987), that a party has "an obligation to call the applicability of another [forum's] law to the court's attention in time to be properly considered." *But see Empire Life Ins. Co. of Am. v. Valdak Corp.*, 468 F.2d 330, 334 (5th Cir.1972) (raising, sua sponte, the district court's erroneous decision to apply the Uniform Commercial Code before its effective date). In *American Int'l Trading Corp. v. Petroleos Mexicanos*, 835 F.2d 536 (5th Cir.1987), however, we recognized our power to address a choice of law issue for the first time on appeal where manifest injustice would result. *See id.* at 540 (parties are bound by the theory of law they argue in district court absent manifest injustice). Because the choice of law issue was not raised below, and because we find no manifest injustice in refusing to decide the issue on appeal, we decline to address it.

diligence finding was ever made, the district court reasoned, the cross-claim is barred.

[2] The district court's grant of summary judgment on this ground is premised on the conclusion that the language of the SSA is unambiguous. A conclusion that a contract is ambiguous – as the district court recognized – is a question of law. Thus, we review the district court's determination de novo. *First Nat'l Bank of Jackson v. Pursue Energy Corp.*, 799 F.2d 149, 151 (5th Cir.1986).

[3] In our view, the SSA is not clear and unambiguous. First, it is unclear what the parties intended by the last clause of paragraph three, which states that Wausau and Occidental "agree not to assert any cause of action, except as permitted by paragraph 4 below, against each other *with respect to the subject matter of the consolidated actions.*" (emphasis added). Because the SSA does not define what is meant by "the subject matter of the consolidated actions," we cannot determine whether Wausau and the American Underwriters' cross-claim against Occidental is included within the terms of that clause. Furthermore, although the provisions relied on by Occidental and the district court in paragraph four – when read out of context – appear clear and unambiguous, those provisions are unclear and ambiguous when read in the context of the entire paragraph. If Wausau and the American Underwriters were absolutely precluded from bringing any subsequent action against Occidental absent a finding that Hvide was negligent in its capacity as manager of the vessel, it would have been unnecessary to include the last two sentences of paragraph four. We think that the last two sentences in paragraph four, which speak in terms of a broad reservation

of rights, render the meaning of the first two sentences in the paragraph ambiguous.

In sum, we are unable to determine from the language of the SSA what the parties intended by paragraphs three and four. The interpretation advanced by Occidental – that the paragraphs represent a broad waiver of rights with a narrow reservation – is a reasonable one. However, the interpretation advanced by Wausau – that the paragraphs represent a broad reservation of rights with a narrow waiver – is also reasonable. There is a fact issue concerning the parties' intent. Accordingly, the district court erred in granting summary judgment in favor of Occidental on the basis of the SSA.

IV. IMPLIED WARRANTY OF SEAWORTHINESS AT THE INCEPTION OF A TIME POLICY

[4] On appeal – as an independent basis for affirming the district court's summary judgment – Occidental contends that, under the undisputed facts, it did not breach any warranty of seaworthiness implied at the inception of a time hull policy. Occidental argues specifically that "the only implied warranty relating to seaworthiness under a time hull policy, is that the insured will not knowingly send the vessel to sea in an unseaworthy condition." Because there was no finding in the first litigation that it knowingly sent the vessel to sea in an unseaworthy condition, Occidental reasons, Wausau's cross-claim is barred.

The district court did not expressly grant summary judgment for Occidental on this ground, but it did conclude "that a breach of the warranty of seaworthiness at

the inception of an insurance policy will void the policy only if the shipowner has prior knowledge of the unseaworthy condition." In reaching this conclusion, the district court recognized that several decisions of this court purported to embrace an *absolute* warranty of seaworthiness in a time hull policy at the moment of attachment. The district court nonetheless reasoned that such cases were inapplicable.

We think that the district court misperceives our prior decisions. As discussed below, federal maritime law[9] implies two warranties of seaworthiness in a time hull insurance policy. The first of these warranties – the implied warranty of seaworthiness at the inception of the policy – is absolute in nature. The second one, which applies only after the policy attaches, is a modified, negative warranty, under which the insured promises not to knowingly send a vessel to sea in an unseaworthy condition. Although the second implied warranty of seaworthiness requires knowledge on the part of the insured, the first does not. The insured breaches this first warranty if the vessel is *in fact* unseaworthy when the policy becomes

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[9] Our decision in *D.J. McDuffie, Inc. v. Old Reliable Fire Ins. Co.*, 608 F.2d 145, 147 n. 1 (5th Cir.1979), *cert. denied*, 449 U.S. 830, 101 S.Ct. 97, 66 L.Ed.2d 35 (1980), indicates that federal law governs questions concerning the warranties of seaworthiness implied in time hull insurance policies. *But see also* Russell W. Pritchett, *The Implied Warranty of Seaworthiness in Time Policies: The American View*, 1983 LLOYD'S MAR. & COM.L. 195, 208 n. 88 (noting that, under *Wilburn Boat Co. v. Fireman's Fund Ins. Co*, 348 U.S. 310, 75 S.Ct. 368, 99 L.Ed. 337 (1955), "it is arguable that state law should control").

effective. Accordingly, Occidental is not entitled to summary judgment on the ground that, because it had no knowledge of the vessel's unseaworthiness, it did not breach the warranty of seaworthiness implied at the inception of the time hull policy.

A. Evolution of the Implied Warranties of Seaworthiness in Time Hull Policies

The implied warranties of seaworthiness in time hull policies are unique to American maritime law. *See generally* Russell W. Pritchett, *The Implied Warranty of Seaworthiness in Time Policies: The American View,* 1983 LLOYD'S MAR. & COM.L. 195. According to one commentator, "[t]he present American rule for implied warranties in time policies is a hybrid of the English rules for voyage and time policies." Derek P. Langhauser, Note, *Implied Warranties of Seaworthiness: Applying the Knowing Neglect Standard in Time Hull Insurance Policies,* 39 ME.L.REV. 443, 449 (1987). Thus, before describing the two warranties of seaworthiness implied in time hull policies under the American rule, we examine the sources of those warranties.

1. *Implied Warranty of Seaworthiness in Voyage Policies*

[5] It is well-settled under maritime law in England and America that there is an implied warranty of seaworthiness in "voyage" insurance policies.[10] In *The Caledonia,* 157 U.S. 124, 131, 15 S.Ct. 537, 540, 39 L.Ed. 644 (1895), the Supreme Court stated:

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[10] Voyage policies insure a vessel for a single voyage, whatever the duration. Time policies, by contrast, insure a vessel for

> Every person who proposes to any insurers to insure his ship against sea perils, during a certain voyage, impliedly warrants that his ship is, in every respect, in a suitable condition to proceed and continue on that voyage, and to encounter all common perils and dangers with safety. * * * This warranty is strictly a condition precedent to the obligation of insurance; if it be not performed, the policy does not attach; and, if this condition be broken, at the inception of the risk, in any way whatever and from any cause whatever, there is no contract of insurance, the policy being wholly void.

Id. at 131, 15 S.Ct. at 140 (quoting PARSONS, 91 MAR. INS. 367). Similarly in England, section 39(1) of the Marine Insurance Act of 1906 provides: "In a voyage policy there is an implied warranty that at the commencement of the voyage the ship shall be seaworthy for the purpose of the particular adventure insured."

The implied warranty of seaworthiness in a voyage policy is absolute in nature. *See* 1 ALEX. L. PARKS, THE LAW AND PRACTICE OF MARINE INSURANCE AND AVERAGE 258 (1987) ("The cases are legion establishing that in a voyage policy, the law implies a warranty on the part of the assured which amounts to a positive undertaking – an absolute condition – that the vessel at the commencement of the voyage is seaworthy"). The word "warranty" in this context, according to Professors Gilmore and Black, "has its most drastic meaning." GRANT GILMORE & CHARLES L.

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an unspecified number of voyages during a specified duration. Derek P. Langhauser, Note, *Implied Warranties of Seaworthiness: Applying the Knowing Neglect Standard in Time Hull Insurance Policies*, 39 ME.L.REV. 443, 449 (1987) (citation omitted).

BLACK, THE LAW OF ADMIRALTY § 2-6, at 63 (2d ed. 1975). If the implied warranty of seaworthiness in a voyage policy is breached – that is, if "the vessel is not in fact seaworthy at the beginning of the voyage or at the inception of the risk – then no recovery can be had on the policy. This result does not depend on the knowledge or fault of the assured." *Id.*(citing *Richelieu & Ontario Nav. Co. v. Boston Marine Ins. Co.*, 136 U.S. 408, 429, 10 S.Ct. 934, 940, 34 L.Ed. 398 (1890), and *Bullard v. Roger Williams Ins. Co.*, 1 Curt. 148, 4 Fed.Cas. 643 (C.C.D.R.I.1852) (No. 2122)). Nor does this result depend on the subsequent loss being directly attributable to the lack of seaworthiness. *See Gregoire v. Underwriters at Lloyds*, 559 F.Supp. 596, 598 (D.Alaska 1982) (citing GILMORE & BLACK, *supra*, at § 2-6).

The absolute nature of this implied warranty of seaworthiness is grounded in a public policy choice. The warranty is intended to take "away all temptation to expose life and property to the dangers of the seas in vessels not fitted to encounter or avoid them." *The Caledonia*, 157 U.S. at 134, 15 S.Ct. at 541 (quoting the jury charge given in *Bullard v. Insurance Co.*). It is premised on the notion that, because the insured is best able to foresee the nature, extent, and necessities of a specific voyage, the insured is also best able to have the vessel adequately prepared for that voyage. *See* Langhauser, *supra*, at 449 (citing *Hoxie v. Pacific Mut. Ins. Co.*, 89 Mass. (7 Allen) 211, 225 (1863), and *Capen v. Washington Ins. Co.*, 66 Mass. (12 Cush.) 517, 536 (1853)). In short, the absolute warranty implied in every voyage insurance policies represents an early attempt by the law to place the risk of loss on the cheapest cost avoider. *See also* GILMORE & BLACK, *supra*, § 2-6, at 65 (absolute nature of the implied warranty of

seaworthiness in a voyage policy "doubtless had a wholesome effect on the discipline of the shipping industry in early, less well-policed days"); *cf.* GUIDO CALABRESI, THE COSTS OF ACCIDENTS (1970).

2. *Implied Warranty of Seaworthiness in Time Policies – English Rule*

Under English law, there is no implied warranty of seaworthiness in a time policy; however, the insurer can escape liability in certain limited circumstances. Section 39(5) of the Marine Insurance Act of 1906 provides:

> In a time policy there is no implied warranty that the ship shall be seaworthy at any stage of the adventure, but where, with the privity of the assured, the ship is sent to sea in an unseaworthy state, the insurer is not liable for any loss attributable to unseaworthiness.

The English rule regarding time policies can thus be separated into two parts. Under the first part of the rule, there is no absolute warranty that tracks the warranty of seaworthiness in voyage insurance policies. A vessel's condition of unseaworthiness cannot void a time insurance policy. Under the second part of the English rule, however, an insurer may be able to disclaim liability for a particular loss if it can demonstrate that (1) the vessel was unseaworthy, (2) the insured was privy to vessel's condition when it was sent to sea, and (3) the unseaworthy condition, proximately caused the particular loss. *See* WILLIAM GOW. MARINE INSURANCE 272 (4th ed. 1909).

The rationale behind the English rule regarding time policies, as embodied in section 39(5) of the Marine Insurance act of 1906, is somewhat unclear. One commentator views the act as merely declaring the common law and expressing "the gist of a great many decisions." 1 PARKS, *supra*, at 264. Others view the English rule as somehow representing equitable considerations. *See* Gow, *supra*, at 272 (reasoning that, because a time policy could commence when a vessel is at sea – beyond the knowledge and control of her owner – "insistence on the warranty in such a case might become inequitable"); *see also* Pritchett, *supra*, at 197 (tracing English refusal to imply warranty of seaworthiness in time policies to *Gibson v. Small*, 4 H.L.Cas. 352 (1853), a case in which the shipowner obtained a time policy while the vessel was on a voyage). Finally, still another commentator considers section 39(5) of the Marine Insurance Act of 1906 to represent a legislative compromise between the arguments advanced by shipowners against implying an absolute warranty in time policies and the arguments advanced by insurers in favor of such a warranty. *See* Langhauser, *supra*, at 449-50.

3. *Implied Warranties of Seaworthiness in Time Policies – American Rule*

The American rule regarding the implied warranties of seaworthiness in time insurance policies is set forth in our decision in *Saskatchewan Government Insurance Office v. Spot Pack, Inc.*, 242 F.2d 385 (5th Cir.1957). After describing the English rule regarding the implied warranty of seaworthiness in time hull policies, we stated:

> But the American Rule, in a rare departure from a determined course of parallel uniformity, . . . implies for a time policy, as does the English Rule as of the commencement of the voyage for voyage policies, . . . a warranty of seaworthiness as of the very moment of attachment of the insurance. And unlike the English Rule which limits the warranty to the commencement of the voyage, the American Rule takes it somewhat further to extend, in point of time, a sort of negative, modified warranty. It is not that the vessel shall continue absolutely to the kept in a seaworthy condition, or even that she be so at the inception of each voyage, or before departure from each port during the policy term. It is, rather, stated in the negative that the Owner, from bad faith or neglect, will not knowingly permit the vessel to break ground in an unseaworthy condition. And, unlike a breach of a warranty of continuing seaworthiness, express or implied, which voids the policy altogether, the consequence of a violation of this 'negative' burden is merely a denial of liability for loss or damage caused proximately by such unseaworthiness.

Id. at 388 (citations omitted). In this passage, Judge Brown recognized two implied warranties of seaworthiness in a time policy. The first one – "a warranty of seaworthiness as of the very moment of attachment of the insurance" – is akin to the absolute warranty of seaworthiness implied in voyage policies under the English Rule. The second one, which has been labelled a modified, negative warranty,[11] looks very much like the

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[11] *See, e.g., Lloyd's U.S. Corp. Smallwood*, 719 F.Supp. 1540, 1549 (M.D.Fla. 1989), *aff'd*, 903 F.2d 828 (11th Cir.1990).

second part of the English rule regarding the implied warranty of seaworthiness in a time policy. That is, under the second warranty, the insured does not absolutely warrant that the vessel shall continue to be seaworthy for the duration of the policy, but only that he or she, "from bad faith or neglect, will not knowingly permit the vessel to break ground in an unseaworthy condition."

Although we described the American rule in *Spot Pack* as being settled, we recognized that "[h]ow this came to be the rule of general acceptance for all Time policies is obscure." 242 F.2d at 388. Commentators were also perplexed by the source of the so-called American rule regarding time policies, and our decision in *Spot Pack* was criticized as resting on "quite slender" authority. *See* GILMORE & BLACK, *supra*, § 2-6, at 63; *see also* Pritchett, *supra*, at 196 ("the 'American Rule' is not so well established as its name implies"). More recently, a federal district court in Alaska opined that "the great majority of the decided cases in this country are consistent with the English Rule," and accordingly rejected the *Spot Pack* formulation of the American rule. *Gregoire v. Underwriters at Lloyds*, 559 F.Supp. at 600-01.

We are aware of the criticism that has been levelled[sic] against our *Spot Pack* decision; however, we decline to revise our interpretation of history. Since our decision in *Spot Pack* we have on several occasions reaffirmed our description of the American rule regarding the implied warranties of seaworthiness in time policies. *See e.g., Insurance Co. of North Am. v. Board of Comm'rs. of the Port of New Orleans*, 733 F.2d 1161, 1165 (5th Cir.1984); *D.J. McDuffie, Inc. v. Old Reliable Fire Ins. Co.*, 608 F.2d 145, 147 (5th Cir. 1979), *cert. denied*, 449 U.S. 830, 101 S.Ct. 97,

66 L.Ed.2d 35 (1980); *Gulfstream Cargo, Ltd. v. Reliance Ins. Co.*, 409 F.2d 974, 983 (5th Cir.1979); *Tropical Marine Prods., Inc. v. Birmingham Fire Ins. Co. of Pa.*, 247 F.2d 116, 119 (5th Cir.1957), *cert. denied*, 355 U.S. 903, 78 S.Ct. 331, 2 L.Ed.2d 260 (1957). In addition, several other circuits have adopted the *Spot Pack* description of the American rule. *See L & L Marine Serv., Inc. v. Insurance Co. of North Am.*, 796 F.2d 1032, 1035 (8th Cir.1986), *cert. denied*, 479 U.S. 1065, 107 S.Ct. 952, 93 L.Ed.2d 1000 (1987); *Kilpatrick Marine Piling v. Fireman's Fund Ins. Co.*, 795 F.2d 940, 945 (11th Cir.1986); *see also McAllister Lighterage Line, Inc. v. Insurance Co. of North Am.*, 244 F.2d 867, 870 (2d Cir. 1957) (recognizing, under Supreme Court's decision in *Union Ins. Co. of Philadelphia v. Smith*, 124 U.S. 405, 8 S.Ct. 534, 31 L.Ed. 497 (1888), that in a term policy of insurance a warranty of seaworthiness arises at the time when the insurance becomes effective), *cert. denied*, 355 U.S. 872, 78 S.Ct. 123, 2 L.Ed.2d 77 (1957).[12] Finally, we remain convinced that the general principles described in *Spot Pack* are sufficiently grounded in precedent. *See* Pritchett, *supra*, at 198-208.

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[12] Several courts, Occidental argues, have rejected our description of the American rule in *Spot Pack*. In *New York, New Haven and Hartford R. Co. v. Gray*, 240 F.2d 460, 466 n.10 (2d Cir.), *cert. denied*, 353 U.S. 966, 77 S.Ct. 1050, 1 L.Ed.2d 915 (1957), the Second Circuit noted that there were statements in American cases to the effect that time policies carry with them an implied warranty of seaworthiness. The Second Circuit in *Gray* nonetheless opined that the language in those cases was dicta. However, shortly after *Gray* was decided, the Second Circuit, in *McAllister Lighterage Line*, embraced the concept of an implied warranty of seaworthiness arising at the inception of a time insurance policy.

B. Nature of the Implied Warranty of Seaworthiness at the Inception of a Time Policy Under the American Rule

[6] This case concerns the precise contours of the first warranty described in our *Spot Pack* decision. there are at least three unresolved questions about the contours of this warranty. First, does the existence of an implied warranty of seaworthiness at the inception of a time hull policy depend on whether the vessel is at port or at sea when the policy attaches? Second, do principles of causation have any role in determining whether a condition of unseaworthiness at the inception of a time policy precludes recovery under the policy? And third, is the implied warranty of seaworthiness at the inception of a time hull policy absolute in nature – such that it is breached if the vessel is *in fact* unseaworthy at the time the policy attaches?

We need only resolve the last question in this case, because the first two questions are not raised. It is undisputed that, when the policy at issue became effective, the Oxy Producer ITB was at a port of repair and not at sea. Moreover, the first lawsuit established that the unseaworthy condition of OXY Producer ITB at the time the policy attached was the sole cause of the loss of the Oxy Producer. Thus, we need only decide whether a breach of the implied warranty of seaworthiness at the inception of a time hull policy requires knowledge or fault on the part of the insured.

We first look to the few cases in which the implied warranty of seaworthiness at the inception of a time

policy was at issue.[13] In *Gulfstream Cargo, Ltd. v. Reliance Insurance Co.*, we held that the existing, "spectacular" unseaworthiness of the vessel – at the moment the time policy was to attach – kept the policy from becoming effective. 409 F.2d at 983. As Occidental points out, however, this holding does not aid our inquiry, because in *Gulfstream* the insured was charged with knowledge of the vessel's unseaworthy condition. *See id.* at 976. Similar facts surrounded the condition of unseaworthiness in *D.J. McDuffie, Inc. v. Old Reliable Fire Insurance Co.*, a case in which we affirmed the district court's finding that the insured had breached its implied warranty of seaworthiness at the inception of the time policy. 608 F.2d at 147. In *McDuffie*, as in *Gulfstream*, there was evidence that the insured had knowledge of the unseaworthy condition at the inception of the policy. *See McDuffie*, 608 F.2d at 147 ("The [insured's] expert witness testified that one month

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[13] In most of the cases discussing the implied warranties of seaworthiness in a time hull policy, it was the negative, modified warranty of seaworthiness that was at issue. *See, e.g., L & L Marine Serv., Inc. v. Insurance Co. of North Am.*, 796 F.2d 1032, 1035 (8th Cir.1986), *cert denied*, 479 U.S. 1065, 107 S.Ct. 952, 93 L.Ed.2d 1000 (1987); *Insurance Co. of North Am. v. Board of Comm'rs of the Port of New Orleans*, 733 F.2d 1161, 1165 (5th Cir.1984); *Tropical Marine Prods., Inc. v. Birmingham Fire Ins. Co. of Pa.*, 247 F.2d 116, 119 (5th Cir.), *cert. denied*, 355 U.S. 903, 78 S.Ct. 331, 2 L.Ed.2d 260 (1957); *Saskatchewan Govt. Ins. Office v. Spot Pack*, 242 F.2d 385, 387 (5th Cir.1957); *Lloyd's U.S. Corp. v. Smallwood*, 719 F.Supp. 1540, 1549 (M.D.Fla.1989), *aff'd*, 903 F.2d 828 (11th Cir.1990); *Gregoire v. Underwriters at Lloyds*, 559 F.Supp. 596, 599 (D.Alaska 1982); *Lemar Towing Inc. v. Fireman's Fund Ins. Co.*, 352 F.Supp. 652, 660 (E.D.La.1972), *aff'd*, 471 F.2d 609 (5th Cir.1973), *cert. denied*, 404 U.S. 976, 94 S.Ct. 292, 38 L.Ed.2d 219 (1973).

before the policy was to take effect, he had recommended that [the vessel] be drydocked for critical repairs."); *see also McAllister Lighterage Line v. Insurance Co. of North Am.*, 244 F.2d at 870-71 (holding that unseaworthiness of vessel breached an express as well as the implied warranty of seaworthiness at the inception of time policy). We conclude, therefore, that the cases addressing this warranty do not decide the issue of whether knowledge of the vessel's unseaworthiness or fault on the part of the insured is a prerequisite for finding a breach.

We thus turn to our decision in *Spot Pack* for guidance. There we equated the warranty of seaworthiness implied at the inception of a time hull policy with the warranty of seaworthiness implied in a voyage policy. *see* 242 F.2d at 388. This latter warranty, according to well-settled precedent, is absolute in nature. As stated in *Douglas v. Scougall*, 4 Dow. 269, 270:

> [T]here is nothing in matters of insurance of more importance than the implied warranty that a ship is seaworthy when she sails on the voyage insured. . . . It is not necessary to inquire whether the owners acted honestly and fairly in the transaction; for it is clear law that, however just and honest the intentions and conduct of the owner may be, *if he is mistaken in fact*, and the vessel is in fact not seaworthy, the underwriter is not liable.

(emphasis added), *quoted in The Caledonia*, 157 U.S. 124, 133-34, 15 S.Ct. 537, 541, 39 L.Ed. 644 (1895). Accordingly, by tracing the implied warranty of seaworthiness at the inception of a time insurance policy to its root – the implied warranty in voyage policies – we conclude that

the *warranty is absolute in nature, requiring neither* knowledge nor fault on the part of the insured.

The sound reasons supporting an absolute, implied warranty of seaworthiness at the inception of a voyage policy also support such a warranty in the context of a time policy – at least where the ship is in a port of repair at the time the policy attaches. It is the insured, not the insurer, who is best able to foresee the intended use of the vessel during the term of a time policy. Consequently, it is the insured, not the insurer, who is in the best position to see that the vessel is adequately prepared for its intended use. Where, as in this case, a time policy attaches while the vessel is in a port of repair, we can discern no reason for relaxing the strict standard embodied in the absolute warranty of seaworthiness implied in a voyage policy. To require knowledge or fault on the part of the insured, in addition to a finding that the vessel was unseaworthy at the inception of the policy,[14] we think, would discourage the owners of vessels from taking steps to assure that the vessel is adequately prepared for its intended use.

In sum, we hold that the warranty of seaworthiness implied at the inception of a time hull policy is absolute in nature. The insurer need not demonstrate that the insured had knowledge of the unseaworthy condition nor that the insured was somehow at fault in not discovering the unseaworthy condition. It is enough to discharge the insurer, as noted in *Scougall*, if "the vessel is in fact not

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[14] We note that it is the insurer who has the burden of demonstrating that the vessel was unseaworthy at the moment the time policy attached. *See Spot Pack*, 242 F.2d at 389. This burden is not insubstantial.

seaworthy" at the inception of the policy. We need not and do not decide, however, whether (a) the absolute warranty arises if the vessel is at sea at the inception of the time policy, or (b) an insurer may claim benefit of the absolute warranty of seaworthiness implied at the inception of the risk if the condition of unseaworthiness does not cause the particular loss.

C. Appropriateness of Summary Judgment on the Basis of Occidental's Compliance with the Implied Warranty of Seaworthiness at the Inception of a Time Policy

[7] The undisputed facts of the case demonstrate that Occidental was not entitled to summary judgment on the ground that it complied with the warranty of seaworthiness at the inception of the policy. In the first lawsuit, the district court found that the Oxy Producer ITB was improperly mated and unseaworthy on delivery to Occidental. The district court also found that this unseaworthy condition was the sole cause of the sinking of the Oxy Producer. Absent some waiver of the implied warranty of seaworthiness at the inception of the policy, these findings, which were affirmed on appeal, demonstrate as a matter of law that Occidental *did not comply* with this absolute warranty. Summary judgment in favor of Occidental on this ground would be wholly inappropriate.

V. DISPLACEMENT OF THE IMPLIED WARRANTY OF SEAWORTHINESS AT THE INCEPTION OF A TIME HULL POLICY

Our decision concerning the absolute nature of the implied warranty of seaworthiness at the inception of a

time policy does not resolve this dispute, because the district court held that two provisions in Occidental's time hull policy effectively waive or displace that warranty. The district court first concluded that the Liner Negligence Clause of the policy effectively supersedes the warranty. The district court also ruled that the Separate Policy of Insurance Treatment Clause ("Separate Policy Clause") provides coverage for the loss of the Oxy Producer even though Hvide, a co-insured, was found partly responsible for the vessel's unseaworthiness. We address each of these holdings in turn.

A. Effect of Liner Negligence Clause

[8] Almost every time hull policy now contains an "Inchmaree Clause." This clause affords coverage for certain perils that are not included within the classic "perils" clause. *See generally* 1 ALEX L. PARKS, THE LAW AND PRACTICE OF MARINE INSURANCE AND AVERAGE 363-406 (1987); Francis L. Tetreault, *The Hull Policy: The "Inchmaree" Clause*, 41 TUL. L. REV. 325 (1967). The purpose of such a clause is to broaden the coverage under a marine insurance policy. *Goodman v. Fireman's Fund Ins. Co.*, 600 F.2d 1040, 1042 (5th Cir.1979). Today, a typical Inchmaree Clause covers loss of or damage to the vessel caused directly by latent defects in the machinery or hull or by operational negligence on the part of certain individuals.[15]

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[15] The latest American version of the Inchmaree Clause provides coverage for (a) accidents in loading, discharging or handling cargo, or in bunkering; (b) accidents in going on or off, or while on drydocks, graving docks, ways, gridirons or pontoons; (c) explosions on shipboard or elsewhere; (d) breakdown of motor generators or other electrical machinery and electrical

[9] Instead of an Inchmaree Clause, the insurance policy issued to Occidental contains a Liner Negligence Clause. This latter clause, it is recognized, provides even broader coverage than the standard Inchmaree Clause. *See* 1 PARKS, *supra*, at 403; Tetreault, *supra*, at 334-35. In particular, the Liner Negligence Clause covers the following risks:

> a. Breakdown of motor generators or other electrical connections thereto; a [sic] bursting of boilers; breakage of shafts; or any latent defect in the machinery or hull;
>
> b. Loss of or damage to the subject matter insured caused directly by:
>
> 1. Accidents on shipboard or elsewhere, other than breakdown of or accidents to nuclear installations or reactors on board the insured vessel;
>
> 2. *Negligence, error of judgment or incompetence of any person;*
>
> excluding under both "a" and "b" above only the cost of repairing, replacing or renewing any part condemned solely as a result of a latent

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connections thereto, bursting of boilers, breakage or shafts, or any latent defect in the machinery or hull (excluding the cost and expense of replacing or repairing the defective part); (e) breakdown of or accidents to nuclear installations or reactors not on board the insured vessel; (f) contact with aircraft, rockets or similar missiles, or with any land conveyance; (g) negligence of charterers and/or repairers, provided such charterers and/or repairers are not an assured hereunder; (h) negligence of masters, officers, crew or pilots, provided such loss or damage has not resulted from want of due diligence by the assured, the owners or managers of the vessels, or any of them.

> defect, wear and tear, gradual deterioration or fault or error in design or construction;
>
> provided such loss or damage (either as described in said "a" or "b" or both) has not resulted from want of due diligence by the Assured(s), the Owner(s) or Manager(s) of the vessel, or any of them. Masters, mates, engineers, pilots or crew not to be considered as part owners within the meaning of this clause should they hold shares in the vessel.

(emphasis added). According to one commentator, the Liner Negligence Clause "is really a species of an 'all risks' policy," under which the underwriter must "prove that the cause of the loss was one which was excluded by the words of the policy." 1 PARKS, *supra*, at 404.

[10] The district court concluded that the Liner Negligence Clause in the policy issued to Occidental "supplants and is a substitute for any implied warranty of seaworthiness" at the inception of the policy. The district court focused specifically on the language which indicates that coverage is provided for loss caused directly by the "negligence, error of judgment or incompetence of *any person;* . . . provided such loss . . . has not resulted from want of due diligence by the Assured(s), the Owner(s), or Manager(s) of the vessel, or any of them." This provision, the district court reasoned, effectively underwrites the pre-attachment negligence and/or error of judgment by Hvide and Avondale that rendered the Oxy Producer ITB unseaworthy.

Wausau argues that, because Occidental breached the absolute warranty of seaworthiness implied at the inception of a time policy, the policy is void and the question

of coverage under the Liner Negligence Clause need not be reached. In support of its argument, Wausau cites two cases: *D.J. McDuffie, Inc. v. Old Reliable Fire Insurance Co.*, 1979 AMC 595 (E.D.La.1977), *aff'd*, 608 F.2d 145 (5th Cir.1979), *cert. denied*, 449 U.S. 830, 101 S.Ct. 97, 66 L.Ed.2d 35 (1980), and *The Natalie*, 1959 AMC 2379 (arbitration). According to Wausau, these two cases demonstrate that, once the insured breaches its implied warranty of seaworthiness at the inception of the policy, recovery is precluded despite the presence of a clause in the policy expanding coverage.

Although Wausau's argument has some logic, it ultimately must be rejected. If we were to adopt Wausau's reasoning, the insured would effectively be precluded from disclaiming this absolute implied warranty of seaworthiness in the policy itself. We decline to adopt such a drastic rule. Moreover, *McDuffie* and *The Natalie* are distinguishable from this case because the policies at issue in those cases contained only Inchmaree Clauses – not Liner Negligence Clauses. At the most, those cases stand only for the proposition that an Inchmaree Clause does not effect an across the board waiver of the implied warranty of seaworthiness at the inception of a time hull policy.

Thus, in deciding whether the district court erred in construing the Liner Negligence Clause, we must answer a difficult question: Does the Liner Negligence Clause, at least with respect to pre-attachment negligence or error in judgment by parties involved in the construction of the vessel, effectively supplant or waive the absolute implied warranty of seaworthiness at the inception of a time hull policy? This question, although it has received some attention from commentators, has not yet been squarely

addressed by any court. We therefore proceed with caution.[16]

Although we have indicated that the implied warranties of seaworthiness in a time hull policy may be disclaimed or waived, we have never specified exactly how such a waiver may be accomplished. Language in *Insurance Co. of North America v. Board of Commissioners of the Port of New Orleans*, 733 F.2d 1161 (5th Cir.1984), suggests that the warranties must be expressly waived. *Id.* at 1165 ("A warranty of seaworthiness by the owner is implied in every hull insurance policy *unless expressly waived*") (emphasis added). In *Tropical Marine Products, Inc. v. Birmingham Fire Insurance Co. of Pennsylvania*, 247 F.2d 116 (5th Cir.), *cert. denied*, 355 U.S. 903, 78 S.Ct. 331, 2 L.Ed.2d 260 (1957), however, we recognized that an Inchmaree Clause – which does not expressly mention any implied warranties of seaworthiness – "affords both an additional series of perils insured against and *markedly affects the warranties of seaworthiness between Shipowner and Underwriter.*" 247 F.2d at 119.

We think that the common sense approach embodied in *Tropical Marine* is the correct one. In that case, the insurer argued that the vessel's unseaworthy condition arising after a time policy had attached voided the policy.

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[16] The parties have assumed that federal maritime law governs this question. Therefore, we assume, without deciding, that federal law controls. *See Albany Ins. Co. v. Anh Thi Kieu*, 927 F.2d 882, 886-87 (5th Cir.) (describing three-part test used to determine whether, under *Wilburn Boat*, state or federal law governs an issue regarding the interpretation of marine insurance), *cert. denied*, ___ U.S. ___, 112 S.Ct. 279, 116 L.Ed.2d 230 (1991).

We rejected the insurer's argument primarily on the basis of language in the Inchmaree Clause. The plain language of the clause, we observed, provided coverage for the loss that had resulted from the vessel's unseaworthy condition. We stated:

> Indeed, far from voiding the policy, it was as to just such unseaworthiness that the policy was meant to apply. An Inchmaree clause insures against damage or loss occasioned by latent defects in machinery or hull. Of course, a defect in machinery or a defect in a hull means that the vessel is thereby unseaworthy since, with such defect, the machinery or hull cannot comply with the classic definition of 'reasonably suitable' for the purposes intended. . . . The only limitation on this is that the defect be latent and one not known or discoverable by the owner or one in privy with him.

247 F.2d at 120-21. Therefore, in determining the extent to which a clause in a time hull policy supersedes or waives an implied warranty of seaworthiness, a court should look to the language of the provision to see if it unambiguously covers risks which would ordinarily be excluded by a breach of the implied warranty of seaworthiness. If the clause does cover such a risk, then it may be said that the clause underwrites that particular type of unseaworthiness. *See id.* at 123.

[11] A careful reading of the Liner Negligence Clause in the policy issued to Occidental demonstrates that it effected at least a partial waiver of the absolute warranty of seaworthiness implied at the inception of the policy. The language of the clause is clear and unambiguous: it provides coverage for loss caused by the "[n]egligence,

error of judgment or incompetence of *any* person." (emphasis added). This provision, unlike the negligence provisions in the Inchmaree Clause, does not limit coverage to operational negligence. Instead, it is worded broadly enough to include the negligence of shipbuilders and the construction manager. *See* 1 PARKS, *supra*, at 406 (subparagraph (b) of the standard Liner Negligence Clause covers the negligence of a "builder, and is not limited to masters, crew, engineers, pilots, and repairers or charterers as in the ordinary Inchmaree Clause"); LESLIE J. BUGLASS, MARINE INSURANCE AND GENERAL AVERAGE IN THE UNITED STATES 139 (2d ed. 1981) (negligence of builders is covered under the Liner Negligence Clause but not under the Inchmaree Clause).

The only limit to the partial waiver of the implied warranty of seaworthiness at the inception of the risk under the Liner Negligence Clause is that the loss may not have resulted from a "want of due diligence by the Assured(s), the Owner(s), or Manager(s) of the vessel." Under the Separate Policy of Insurance Treatment Clause, *see infra* Part V.B., Occidental is treated as the only "assured" under the due diligence portion of the Liner Negligence Clause. Therefore, to come within the protection of the Liner Negligence Clause, the loss in this case must not have resulted from a want of due diligence by Occidental, in its role as assured or owner, or from a want of due diligence by Hvide in its role as manager of the vessel.

In our view, the undisputed facts demonstrate that the loss of the Oxy Producer was not caused by any lack of due diligence on the part of Occidental in its status as assured/owner, nor by any lack of due diligence on the

part of Hvide as manager of the vessel. In the first lawsuit, it was determined that the actions of Hvide, as construction supervisor, and Avondale, as the builder of the vessel, were the *sole* cause of the loss. *See Employers Ins. of Wausau v. Suwanee River Spa Lines, Inc.*, 866 F.2d at 773. There is no contention by Wausau that Occidental itself was somehow responsible for the vessel's unseaworthy condition. In addition, contrary to Wausau's argument, Hvide's want of due diligence as construction supervisor cannot, as a matter of law, be imputed to Occidental, because Hvide was not an agent of Occidental's, but instead an independent contractor. *See id.* at 773-74 (concluding that Hvide, in its role as construction supervisor, had no actual or apparent authority to bind Occidental). Finally, we decline to impute Hvide's lack of due diligence as construction supervisor to Hvide as manager. Therefore, the due diligence portion of the Liner Negligence Clause does not exclude the type of unseaworthiness at issue here.

In sum, we hold that the district court correctly granted summary judgment in favor of Occidental on the basis of the Liner Negligence Clause. The plain language of that clause effectively underwrites the unseaworthiness that caused the sinking of the Oxy Producer. In essence, it covers loss caused by the negligence of any person other than the insured, the owner, or the manager of the vessel. For purposes of this case, it is broad enough to cover the negligence of Hvide as the construction supervisor and the negligence of Avondale as the ship builder. At least to this extent, then, the Liner Negligence Clause waives or displaces the absolute warranty of seaworthiness implied at the inception of a time policy.

B. Effect of Separate Policy of Insurance Treatment Clause

[12] The district court also granted summary judgment on the basis of the Separate Policy of Insurance Treatment Clause, under which "all terms, conditions, and exclusions [are] treated as if a separate policy of insurance were issued to each assured." This clause, the district court reasoned, prevents the negligence of Hvide in supervising the mating of the vessel from being imputed to Occidental. The district court accordingly concluded that the Separate Policy Clause independently provides Occidental with coverage for the loss of the Oxy Producer.

We hold that the district court erred in granting summary judgment solely on the basis of the Separate Policy Clause. This clause, unlike the Liner Negligence Clause, does not displace or waive the implied warranty of seaworthiness at the inception of the risk. Instead, as Wausau points out, the Separate Policy Clause "requires *each assured* to comply with policy requirements 'as if a separate policy of insurance were issued' to that assured individually." Thus, under Occidental's hypothetical separate time hull policy, it would have been required – but for the Liner Negligence Clause – to independently comply with the absolute warranty of seaworthiness implied at the moment the policy attached. The Separate Policy Clause, while it affected the operation of the Liner Negligence Clause, by itself neither displaced nor changed the terms of the implied warranty of seaworthiness at the inception of the policy.

VI. WAIVER AND ESTOPPEL

As additional grounds supporting the district court's grant of summary judgment, Occidental argues that Wausau and the American Underwriters have waived or are estopped to assert this cross-claim. Occidental argues specifically that, by voluntarily paying the loss after they had adequate time to investigate the circumstances surrounding the loss, Wausau and the American Underwriters waived their right to assert policy defenses. In addition, Occidental argues that, due to their conduct in the first lawsuit, Wausau and the American Underwriters are estopped from now asserting their cross-claim.

Summary judgment on the waiver and estoppel theories advanced by Occidental is not appropriate. With regard to Occidental's waiver theory, the undisputed facts demonstrate that Wausau and the American Underwriters did not "voluntarily" pay the loss, but instead paid under a reservation of rights. Moreover, with regard to the estoppel argument, there are clearly fact issues regarding Occidental's alleged reliance on representations and/or conduct by Wausau and the American Underwriters.

VII. CONCLUSION

The district court did not err in granting summary judgment in favor of Occidental. Although Occidental is not entitled to summary judgment on the ground that (a) the Standstill Agreement precludes the cross-claim, (b) it complied with the absolute implied warranty of seaworthiness at the inception of the time hull policy, (c) the loss was covered under the Separate Policy of Insurance

Treatment Clause in the policy, or (d) Wausau and the American Underwriters waived or are estopped to assert this cross-claim, Occidental is entitled to summary judgment on the basis of the Liner Negligence Clause. Therefore, we AFFIRM the judgment of the district court in favor of Occidental.

MINUTE ENTRY
McNAMARA, J.
SEPTEMBER 5, 1991 (ENTERED SEPTEMBER 6, 1991)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

EMPLOYERS INSURANCE OF WAUSAU AS REPRESENTATIVE OF THOSE CERTAIN UNDERWRITERS SUBSCRIBING TO CERTIFICATE NO. 14480, ET AL	* * * * *	CIVIL ACTION NO. 82-4034, C/W 82-4185, 82-4186
VERSUS	* *	SECTION "D" (5)
AVONDALE SHIPYARDS, INC., ET AL	* *	

Before the court are the Cross-Motions for Summary Judgment filed by American Underwriters and the OXY parties. The Motions are before the court on briefs without oral arguments.

FACTUAL BACKGROUND

The plaintiffs in these consolidated actions are London Underwriters (Lloyd's and London Companies), Employers of Wausau (representing American and certain foreign, non-British underwriters), HVIDE companies, supervisors of the construction, charterers and managers of the ITB and certain Occidental Companies (OXY) as charterers of the ITB. The consolidated cases and these cross-motions involve the loss on September 20, 1981, of the CATUG *OXY PRODUCER*. The *OXY PRODUCER* was a part of the integrated tug barge (ITB) that also consisted

of the *Barge OXY 4102*. The ITB was insured under a "pair and set" clause so that the loss of the *OXY PRODUCER* resulted in the constructive total loss of the ITB under the relevant hull policies.

The liability issues concerning loss of the OXY PRODUCER were tried to Judge Sear of this court who rendered his opinion on June 3, 1986. On appeal, the Fifth Circuit issued its opinion in February 1989 deciding the liability issues arising from the loss of the OXY PRODUCER and remanded for further proceedings before this court . . . , *see Employers Ins. of Wausau v. Suwanee River Spa Lines, Inc.*, 866 F.2d 752 (5th Cir. 1989). The parties have now settled the majority of the claims in these consolidated actions. The only remaining claim is a cross-claim for return of policy proceeds filed by American Underwriters in 1989 in which they seek to recover the funds paid to their insured OXY in 1982 to settle the claim.

The London and American Underwriters ("AMU") paid for this constructive total loss in 1982, with the exception of $18,000.00 that was paid by one American underwriter in February 1983. The American Underwriters allege that because the cause of the loss of the OXY PRODUCER had not been determined, payment was made by the Underwriters with a full reservation of all their rights. AMU alleges that the Fifth Circuit's finding that the OXY PRODUCER ITB was unseaworthy at the inception of the insurance policy rendered the policy void and entitles them to recover the sums paid to OXY under their reservation of rights. Subsequent to the payment of the claims, and prior to the trial, the American Underwriters, OXY, and HVIDE entered into an agreement labeled

a Standstill Agreement (hereinafter "SSA"), which OXY argues limits the type of actions that AMU, HVIDE, and OXY could file against each other.

DISCUSSION

In its memoranda filed in support of its Motion for Summary Judgment, OXY alleges six specific reasons why the court should grant its motion for summary judgment. The court finds at least three of the six reasons are sufficient to support the granting of the motion for summary judgment and it is thus unnecessary to discuss the other three reasons.

The Standstill Agreement Forecloses AMU's Cross-Claim Against OXY

The SSA was entered into by AMU, OXY and HVIDE after the filing of the original suits but before the trial deciding the issue of liability in the consolidated actions. The agreement was entered into between the parties in an effort to present a united front in the recovery effort against the various defendants in the consolidated actions. Contrary to the assertions of AMU, the court finds that the language of the SSA is clear and unequivocal and prohibits AMU's cross-claim against OXY.

The SSA provided, as to future causes of action between AMU and OXY, as follows:

> Paragraph 3: . . . ; and AMU and OXY agree not to assert any cause of action, *except as permitted by paragraph 4 below,* against each other with respect to the subject matter of the consolidated actions.

Paragraph 4: In the event that the United States Court in the OXY Producer Action finally determines, including appeals, *that there was a want of due diligence of HVIDE as manager of the vessel* OXY PRODUCER/OXY 4102 under the so-called Liner Negligence clause of the aforementioned policies and that the recovery of the United States Underwriters is reduced by an amount exceeding 20% of the amounts covered and paid under said Hull and Machinery and Increased Value policies on account of said want of due diligence ("Failure of Due Diligence Holding"), then AMU may, on behalf of said United States Underwriters, seek the recovery in a Subsequent Proceeding of any amounts not recovered on account of said want of due diligence. *If no such Failure of Due Diligence Holding is finally made by the Court then no Subsequent Proceedings shall be instituted or permitted by the United States Underwriters.* Each party hereto agrees, subject to paragraph 2 above and to this paragraph 4, that in any Subsequent Proceeding all substantive or procedural rights, remedies, claims or defenses they may have as of the date hereof may be asserted, except that each agrees that any defense of any applicable statute of limitations will be tolled with respect to such rights, remedies, claims or defenses and each agrees to hereby waive any defense of laches or other legal or equitable defense based upon the lapse of time.

Except as may be limited hereby, it is the intent that the parties hereto shall be left free to pursue in a Subsequent Proceeding whatever rights they may have as of the date hereof. (emphasis added)

If the language of the SSA were ambiguous, then summary judgment would be improper, for the intent of the parties would then be a genuine issue of material fact. *Freeman v. Continental Gin Co.*, 381 F.2d 459, 465 (5th Cir. 1967)(citations omitted). But the preliminary question whether an ambiguity exists is not a question of fact and is for the court to decide. *Id.* The court, in determining the meaning of the contract, is required to look at all operative usages and all relevant circumstances other than oral statements by the parties of what they intended it to mean. *Id.* Furthermore, a contract is not rendered ambiguous by the mere fact that the parties do not agree upon the meaning of the terms. *Id.*

The court finds that the language of the SSA is clear and unambiguous and limits AMU's right to bring an action against OXY to a circumstance where there has been a finding of lack of due diligence of HVIDE as manager of the ITB. The Fifth Circuit has rendered its decision on liability in these consolidated actions and no failure of due diligence holding under the Liner Negligence Clause was made against HVIDE. *Employers*, 866 F.2d at 752. The court found that the sole cause of the sinking was due to improper or lack of a proper mating, and failure to inspect the mating, of the two units, the CATUG OXY PRODUCER and its barge unit, OXY 4102, resulting in relative motion between the two units opening holes in the catamaran hulls of the tug, into which sea water entered. *Id.* at 767-68. Those solely at fault were found to be Avondale and HVIDE for pre-delivery acts or omissions. *Id.* However, HVIDE was not found liable for any fault as manager of the ITB. *Id.* The court recognized that HVIDE acted in two roles – as supervisor of the

design and construction of the vessel, and as manager of the vessel upon delivery to the charterer.

Regardless of what reservation of rights AMU believed it may have had when it paid the claims pursuant to the contract of insurance with OXY, AMU subsequently entered into the SSA which specifically limited any further causes of action against OXY. Pursuant to the clear and unambiguous language of the SSA, AMU waived its right to bring this cross claim unless there was a finding by the court in the liability action that there was a lack of due diligence on the part of HVIDE, as manager of the vessel, under the Liner Negligence Clause that caused a 20% reduction in recovery. Since the Fifth Circuit did not find any such lack of due diligence, the cross-claim of AMU is barred by the SSA.

The Liner Negligence Clause Insured Against the Loss and Its Due Diligence Provision Supplants and is a Substitute for any Implied Warranty of Seaworthiness

In deciding the liability issue, Judge Sear found, and the Fifth Circuit affirmed, that the sole cause of the sinking of the OXY PRODUCER was improper or lack of a proper mating, and failure to inspect the mating, of the two units, the CATUG OXY PRODUCER and its barge unit, OXY 4102, resulting in relative motion between the two units opening holes in the catamaran hulls of the tug, into which sea water entered. In short, the court found that the vessel was unseaworthy at the time of delivery due to the negligence of Avondale, as builder of the vessel, and HVIDE as supervisor of the construction of the vessel. The court finds that this loss caused by the

negligence of the shipbuilder and the construction supervisor is a covered peril under the hull policy's Liner Negligence Clause ("LNC"), and the existence of this unseaworthy condition at the time of the inception of the insurance does not negate the coverage of the LNC.

The LNC, included by the hull underwriters in the hull policy, is an extension or enlargement of the coverage provided in the basic hull policy. It provides for a number of additional insured perils: "this insurance also covers: b. Loss . . . directly caused by: . . . negligence, error of judgment or incompetence of any person; . . . provided such loss . . . has not resulted from want of due diligence by the Assured(s), the Owner(s), or Manager(s) of the vessel, or any of them." It has already been found that this loss was caused by the negligence of HVIDE, as construction supervisor, and Avondale, as builder, in failing to mate properly and failing to test or supervise mating and testing thereof, which resulted in an unseaworthy fit and vessel. This negligence causing the loss was therefore an insured peril under the LNC of the policy.

It is further apparent from the decision that the loss was not caused by a "want of due diligence" on the part of OXY (as owner or assured) so as to void coverage under the lack of due diligence provision of the LNC. The established negligence of HVIDE did not occur at a time when HVIDE was the "manager of the vessel" or an "assured" under the hull policies, but when it was acting or failing to act, pursuant to the supervision contract; not the separate management contract. There was no finding or holding of failure of due diligence on HVIDE's part as manager of the vessel. Furthermore, the negligence found

on the part of HVIDE occurred before HVIDE was an "insured" under the hull policies.

The court finds that the unseaworthy condition of the vessel at the inception of the insurance policy does not void the policy. The court recognizes there are instances where the Fifth Circuit has held that there is an implied warranty of seaworthiness in a time Hull policy, and that if the vessel is unseaworthy at the time the insurance attaches, the breach absolutely voids the policy. *See, Gulfstream Cargo, Ltd. v. Reliance Ins. Co.*, 409 F.2d 974 (5th Cir. 1969); *D.J. McDuffie, Inc. v. Old Reliable Fire Insurance Co.*, 608 F.2d 145 (5th Cir. 1979). However, the court finds that these cases are inapplicable to the present facts. In *Gulfstream*, the court found that the insureds were aware of "spectacular unseaworthiness" of the vessel and fraudulently concealed such from the insurer. *Gulfstream*, 409 F.2d at 982-83. In *McDuffie*, the court noted several factors that would clearly indicate to the owners of the vessel that it was in an unseaworthy condition. *McDuffie*, 608 F.2d at 147. Furthermore, prior Fifth Circuit jurisprudence holds that if the shipowner has no knowledge of an unseaworthy condition at the inception of the insurance coverage, there is no breach of the limited warranty of seaworthiness, and the insurance is effective. *Tropical Marine Products, Inc. v. Birmingham Fire Insurance Co. of Pa.*, 247 F.2d 116 (5th Cir. 1957)(citing *Saskatchewan Government Insurance Office v. Spot Pack*, 242 F.2d 385 (5th Cir. 1957).) After analyzing these cases, the court finds that a breach of the warranty of seaworthiness at the inception of an insurance policy will void the policy only if the shipowner has prior knowledge of the unseaworthy condition.

In *Tropical Marine,* Judge Brown further discussed the effect of the Inchmaree clause, which expanded the perils covered by the hull policy, had upon the warranties of seaworthiness between the shipowner and underwriter. In answering the contentions of the underwriter that unseaworthiness voided the policy, Judge Brown said:

> Indeed, far from voiding the policy, it was as to just such unseaworthiness that the policy was meant to apply. The Inchmaree clause insures against damage or loss occasioned by latent defects in machinery or hull. Of course, a defect in machinery or a defect in a hull means that the vessel is thereby unseaworthy since, with such defect, the machinery or hull, cannot comply with the classic definition of 'reasonably suitable' for the purposes intended [citations omitted]. The only limitation on this is that the defect be latent and one not known or discoverable by the owner or one in privy with him.

Id. at 120-21.

In further discussing the Inchmaree clause, Judge Brown stated:

> We cannot emphasize too strongly that, as was the purpose of the underwriters in making the change, the Inchmaree clause is an expansion of coverage of considerable magnitude. Unlike so many cases [citations omitted], where each policy contained an express warranty of continuing seaworthiness and an exclusion of losses caused by unseaworthiness, a Time Hull Policy with no warranty of continuing seaworthiness but with an Inchmaree clause does in fact underwrite unseaworthiness of many types.

Id. at 122-23

In conclusion Judge Brown held:

> Consequently, this is not the simple case in which a loss due to unseaworthiness affords a double-barreled reason for non-payment – a defense based upon the breach of the warranty, express or implied, or as automatic proof that the loss arose from this rather than a specified peril (perils of the sea) insured against. For if the vessel really sank because the hull was unseaworthy, or by reason of the action of the sea on that unseaworthy hull, as distinguished from the action of the sea alone, this no longer automatically denies recovery. Recovery is denied now only if that unseaworthiness is one not caused or brought about by the various elements of the Inchmaree clause.

Id. at 123.

The present facts differ from the facts in *Tropical Marine* in that OXY is alleging coverage under a Liner Negligence Clause and not an Inchmaree Clause, but the court finds that the LNC is an expanded Inchmaree Clause, which underwrites even more causes of unseaworthiness. Thus, the ruling in *Tropical Marine* is applicable to the present facts. The court further finds that the due diligence clause found in the LNC and the Inchmaree Clause replaces any implied or express warranty of seaworthiness. The reasoning for this finding was best explained by Francis Tetreault's article on the hull policy:

> Just as it has been held that the 'due diligence' provision of the Inchmaree Clause applies only to the risks stated in that clause and not to the remainder of the policy, it is

> submitted, in principle, that the special risks covered by the Inchmaree Clause must be read independently of any warranty of seaworthiness which American law may imply, with the 'due diligence' proviso of the clause viewed as full substitute for the warranty.

Tetreault, *The Hull Policy: The "Inchmaree" Clause*, 41 Tul. L. Rev. 325, 341 (1967).

The Liner Negligence Clause in the present policy insures against loss caused by "negligence, error of judgment or incompetence of any person; . . . provided such loss . . . has not resulted from want of due diligence by the Assured(s), the Owner(s), or Manager(s) of the vessel, or any of them." The court has already held that this clause covers a loss caused by the negligence of the employees of Avondale and HVIDE (acting as the construction supervisor) in the building of the vessel. The due diligence clause of the LNC was not breached because HVIDE was negligent in its duties as the construction supervisor of the vessel, not the manager of the vessel. HVIDE was acting in two separate roles and its negligence in its role as construction supervisor cannot be imputed to its role as manager of the vessel.

This negligence in the construction creates a defect in the vessel rendering the vessel unseaworthy at the inception of the insurance. But, the owners of the OXY PRODUCER had no prior knowledge that the vessel was unseaworthy at the inception of the policy. Not until after the trial on the liability issue was it clear that the vessel was unseaworthy at the inception of the policy. Furthermore, the LNC provided protection against the type of negligence that created the loss. Thus, the hull policy

issued by AMU, through its LNC, and the finding by Judge Sear that negligence of the builders and construction supervisor created the unseaworthiness which caused the loss, placed the loss in the position of an insured peril, regardless of the presence of unseaworthiness.

Coverage for OXY is Present Under the LNC Provisions of the Hull Policy Despite Negligent Acts or Omissions of HVIDE Pursuant to the Policy Clause Entitled "Separate Policy of Insurance Treatment"

Even if the court had found that HVIDE was guilty of a lack of due diligence as an assured or manager of the vessel, this negligence cannot be imputed to OXY so as to void OXY's coverage under the LNC. The court has previously held that HVIDE was an independent contractor and not an agent of OXY. Furthermore, the hull policy contained a clause entitled "Separate Policy of Insurance Treatment" which provided:

> The policy of insurance referred to in this certificate covers more than one insured person, therefore, all terms, conditions and exclusions will be treated as if a separate policy of insurance were issued to each assured. . . .

A similar clause appeared in *County of Wyoming, N.Y. v. Ins. Co. of N. America*, 518 F.2d 23 (2d Cir. 1975). Therein, the two assureds occupied different relationships to the piece of equipment involved (a road paver) which was insured under a policy naming both. The court said:

> Since Midland, the owner of the paver, is an assured under the INA policy, its property damage presumably is not covered under the policy.

> But Wyoming, though an insured, is not the owner of the damaged property and is potentially liable for its loss. That each insurer [sic, insured] is to be treated separately is made clear in the definitions part of the INA policy, which, in defining 'Insured', states:
>
> > 'The insurance afforded applies separately to each Insured against whom claim is made or suit is brought except with respect to the limits of INA's liability.'
>
> In commenting upon such a clause, Professor Keaton has stated:
>
> > Suppose that one lends his car to another and that the borrower damages the lender's garage when returning the car. Under [an older] policy form, it was debatable whether coverage was excluded because the damage was 'property owned or transported by the insured,' the lender. With the new severability of interest clause, it is cleared that the 'insured' for the purpose of this claim is the borrower, not the lender, and the exclusion does not apply. R. Keaton, Insurance Law, Section 2.11(b)(6), at 83 (1971, citing other cases).

518 F.2d at 28.

In addition to the protection given OXY by the "separate policy of insurance treatment" clause, OXY itself was in no way found at fault. Thus, coverage for OXY was present under the Hull Policy, and AMU is not entitled to recover the amounts it has already paid to OXY.

CONCLUSION

The SSA bars the cross-claim of AMU. Paragraph 4 of the SSA bars any subsequent proceeding unless the court finds a failure of due diligence on the part of HVIDE, acting as manager of the vessel, in excess of twenty percent. No such holding was made in the previous rulings; thus, this subsequent proceeding is barred.

Moreover, AMU's claim that the policy was void at its inception is faulty. The Fifth Circuit affirmed Judge Sear's finding that the loss of the OXY PRODUCER was caused by pre-delivery negligence by Avondale, the builder, and HVIDE, acting as building supervisor, rendering the vessel unseaworthy on delivery. The hull policy's LNC specifically insured this loss by covering the "negligence of any person," which includes negligence of the builder. It is immaterial that this negligence resulted in unseaworthiness, because the policies [sic] LNC insures unseaworthiness of many types, including a builder's negligence. Further, OXY was not aware that the vessel was unseaworthy at the inception of the insurance policy.

Finally, even if the court had found that HVIDE was guilty of a lack of due diligence as an assured or manager of the vessel, this negligence cannot be imputed to OXY so as to avoid OXY's coverage under the LNC because of the "Separate Policy of Insurance Treatment" clause found in the hull policy. Accordingly;

IT IS ORDERED that OXY's Motion for Summary Judgment should be and is GRANTED.

* * *

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 91-3855

EMPLOYERS INSURANCE OF WAUSAU,
in their own right, and as
Representative of Those Certain
American Underwriters Subscribing
to Certificate No. 14880, Etc., ET AL.

Plaintiffs-Appellants,

versus

OCCIDENTAL PETROLEUM CORPORATION, ET AL.,

Plaintiffs-Appellees,

versus

AVONDALE SHIPYARDS, INC., ET AL.,

Defendants.

****

OCCIDENTAL PETROLEUM CORPORATION, ET AL.,

Plaintiffs,

versus

AVONDALE SHIPYARDS, INC., ET AL.,

Defendants.

Appeals from the United States District Court
for the Eastern District of Louisiana

ON PETITION FOR REHEARING

(February 10, 1993)

Before Van Graafeiland, King and Garza, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

/s/ Carolyn Dineen King
United States Circuit Judge

REHG-4

CLERK'S NOTE:
SEE FRAP AND LOCAL
RULES 41 FOR THE
STAY OF MANDATE

(Filed Dec. 19, 1992)

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 91-3855

D.C. Docket No. 82 4034, et al.

EMPLOYERS INSURANCE OF WAUSAU,
in their own right, and as
Representative of Those Certain
American Underwriters Subscribing
to Certificate No. 14880, Etc., ET AL.

Plaintiffs-Appellants,

versus

OCCIDENTAL PETROLEUM CORPORATION, ET AL.,

Plaintiffs-Appellees,

versus

AVONDALE SHIPYARDS, INC., ET AL.,

Defendants.

****

OCCIDENTAL PETROLEUM CORPROATION, ET AL.,

Plaintiffs,

versus

AVONDALE SHIPYARDS, INC., ET AL.,

Defendants.

Appeals from the United States District Court
for the Eastern District of Louisiana

Before VANGRAAFEILAND[1], KING and EMILIO M. GARZA, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is affirmed.

IT IS FURTHER ORDERED that plaintiffs-appellants pay to plaintiffs-appellees the costs on appeal to be taxed by the Clerk of this Court.

ISSUED AS MANDATE: FEB 22 1993

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[1] Senior Circuit Judge of the Second Circuit, sitting by designation.

AMERICAN INSTITUTE INCHMAREE CLAUSE

Subject to the conditions of this Policy, this insurance also covers loss of or damage to the Vessel directly caused by the following:

Accidents in loading, discharging or handling cargo, or in bunkering;

Accidents in going on or off, or while on dry-docks, graving docks, ways, gridirons or pontoons;

Explosions on shipboard or elsewhere;

Breakdown of motor generators or other electrical machinery and electrical connections thereto, bursting of boilers, breakage of shafts, or any latent defect in the machinery or hull, (excluding the cost and expense of replacing or repairing the defective part);

Breakdown of or accidents to nuclear installations or reactors not on board the insured Vessel;

Contact with aircraft, rockets or similar missiles, or with any land conveyance;

Negligence of Charters and/or Repairers, provided such Charterers and/or Repairers are not an Assured hereunder;

Negligence of Masters, Officers, Crew or Pilots;

provided such loss or damage has not resulted from want of due diligence by the Assured, the Owners or Managers of the Vessel, or any of them.

LINER NEGLIGENCE CLAUSE

Subject to the conditions of this Policy, this insurance also covers:

a. Breakdown of motor generators or other electrical machinery and electrical connections thereto; bursting of boilers; breakage of shafts; or any latent defect in the machinery or hull;

b. Loss of or damage to the subject matter insured directly caused by:

1. Accidents on shipboard or elsewhere, other than breakdown of or accidents to nuclear installations or reactors on board the Insured Vessel;

2. Negligence, error of judgment or incompetence of any person;

excluding under both "a" and "b" above only the cost of repairing, replacing or renewing any part condemned solely as a result of a latent defect, wear and tear, gradual deterioration or fault or error in design or construction;

provided such loss or damage (either as described in said "a" or "b" or both) has not resulted from want of due diligence by the Assured(s), the Owner(s) or Manager(s) of the Vessel, or any of them. Masters, mates, engineers, pilots or crew not to be considered as part owners within the meaning of this clause should they hold shares in the Vessel.

Supreme Court, U.S.
FILED
JUN 9 1993
OFFICE OF THE CLERK

No. 92-1789

In The

Supreme Court of the United States

October Term 1992

EMPLOYERS INSURANCE OF WAUSAU, etc., et al.,

Petitioners,

versus

OCCIDENTAL PETROLEUM CORPORATION, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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RESTATEMENT OF THE QUESTION PRESENTED FOR REVIEW

Petitioners have presented four separate questions for review (Petition at i). For the reasons indicated in this opposition brief, Respondents submit the following as a single, fair and accurate restatement of the question presented for review:

> Whether marine insurers which issued a time hull policy on a vessel may recover the payment which they made under the policy for loss of the vessel because it was subsequently found (after trial) to be unseaworthy at inception of the risk, when the policy expressly covered the "negligence . . . of any person . . . provided such loss . . . has not resulted from want of due diligence" on the part of the assured/owner (as was also found).[1]

Subsumed in this restated question are the first three of Petitioners' questions. Petitioners' fourth question is a procedural point which Respondents demonstrate herein (Pt. 4, page 8) is not even appropriately raised.

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[1] *Cf.*, the question for decision as narrowly framed in the opinion below (Pet. App. at 43):

> Does the Liner Negligence Clause [in the time hull policy issued to Occidental], at least with respect to pre-attachment negligence or error in judgment by parties involved in the construction of the vessel, effectively supplant or waive the absolute implied warranty of seaworthiness at the inception of a time hull policy? (Bracketed material added.)

STATEMENT REQUIRED BY RULE 29.1

This Brief in Opposition to Petition for Certiorari is filed on behalf of

1 – Occidental Petroleum Corporation ("OPC") and the following corporations which are direct or indirect wholly-owned subsidiaries of OPC:

2 – Occidental Chemical Corporation (by merger into it of Occidental Chemical Agricultural Products, Inc., which itself was a direct or indirect wholly-owned subsidiary of OPC);

3 – Suwannee River Chartering, Inc.; and

4 – Suwannee River SPA Lines, Inc.

Neither OPC nor any of its subsidiaries hereinabove identified has parents or subsidiaries which are other than wholly-owned, directly or indirectly, except that OPC, directly or indirectly, holds less than full ownership in:

Canadian Occidental Petroleum, Ltd.
Carbocioro S.A.Industries Quimicas
Citco Union Texas Petroleo do Brasil, Ltda.
Diamond Shamrock Chemicals Company Pty. Limited
Occidental Petroleum (South America), Inc.
OXYTECH Systems, Inc.
Repsol Occidental Corporation
Sumidurez Singapore Pte. Ltd.
Thai Diamond Shamrock Ltd.
Thai Occidental Chemical Ltd.
Trans-Jeff Chemical Corporation
Vanyoganneft

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REPORTS OF OPINIONS DELIVERED BELOW

The opinion of the Court of Appeals is reported as *Employers Insurance of Wausau v. Occidental Petroleum Corporation*, 978 F.2d 1422, 1993 A.M.C. 1460 (5th Cir. 1992).[2] The opinion of the District Court is reported only as *Employers Insurance of Wausau, Inc. v. Avondale Shipyards, Inc.*, 1992 A.M.C. 477 (E.D. La. 1991).

STATEMENT OF THE CASE

This particular facet of the extensive litigation spawned from the sinking of the OXY PRODUCER ITB, in 1981, involves a cross-claim filed by certain American insurers ("Underwriters" or "Petitioners") against Occidental Petroleum Corporation and allied interests ("Occidental" or "Respondents"), which for all practical purposes was the vessel owner and the assured under the policy, to recover the payment which they had made under the insurance policy issued to Occidental for a portion of the loss.

Having been for the most part frustrated in their subsequent efforts, as subrogees of their assured, to recover the loss from the shipbuilder and construction supervisor who alone were found responsible for the

---

[2] The opinion of the Court of Appeals is reproduced in the Appendix to the Petition for Certiorari filed herein. Citations to that opinion in this brief will be designated as "Pet. App. at ___."

vessel's unseaworthy condition, the Underwriters eventually sought recoupment from Occidental. They proceeded on the grounds that their insurance policy never took effect because the vessel was in fact unseaworthy when the risk attached and that this condition constituted a breach of an implied warranty of seaworthiness asserted to be an "absolute" condition of the insurance policy.[3]

Although Respondents for the most part accept the strictly factual portion of Petitioners' statement of the case (Petition at 2-7), they believe it appropriate to correct certain misleading characterizations regarding awareness of the unseaworthy condition which caused the loss. Thus, Petitioners state that the improper mating of the ITB components "was apparent and had actually been discovered . . . prior to the release of the ITB from the shipyard" (Petition at 5); and that the unseaworthy condition was "open, obvious *and discovered* (*Id.*. at 18), and

---

[3] The Underwriters' initial (subrogated) action for recovery of the loss, against the shipbuilder and others, was itself premised on unseaworthiness of the vessel upon its delivery to Occidental. Occidental mainly joined in that action, not for recovery of the vessel's loss, since Occidental had been paid, but for incidental expenses associated with alteration of the interconnection system of the vessel's two sister ships, to comply with classification and government regulations. See *Employers Ins. of Wausau v. Suwannee River SPA Lines, Inc.*, 866 F.2d 752, 755-57 (5th Cir.), *cert. den.*, 493 U.S. 820, 110 S. Ct. 77, 107 L. Ed. 2d 43 (1989). The Underwriters' subrogated recovery claim was found for the most part to be foreclosed by this Court's decision in *East River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 106 S. Ct. 2295, 90 L. Ed. 2d 865 (1986). See *Employers Ins., supra*, 866 F.2d at 758 et seq.

resulted from "known *deviations* from crucial construction specifications" (*Id.* at 19).

But as Petitioners themselves elsewhere acknowledge: "It was not determined until the conclusion of the [subrogated] recovery action against the parties involved with the construction of the vessel" [*Employers Ins. of Wausau v. Suwannee River SPA Lines, Inc.*, 866 F.2d 752, 1990 A.M.C. 447 (5th Cir. 1989)] that the unseaworthiness was present upon delivery of the vessel. (Petition at 4; bracketed material added.)

The undisputed facts (as reiterated in the decision of which review is now being sought), are that the loss of the vessel was not caused by any lack of due diligence on the part of Occidental, the assured/owner, nor by any lack of due diligence on the part of the manager of the vessel. Pet. App. at 46-47. Instead, it was determined (after trial of the subrogation lawsuit) that the actions of the shipbuilder and construction supervisor were the sole cause of the loss.

Following a thorough exposition of the litigation's lengthy history, and analysis of the interplay between (a) an implied warranty of seaworthiness that might otherwise apply at inception of the insurance risk and (b) the specific provisions of the insurance policy issued to Occidental, the Fifth Circuit's decision (Judge King) concluded:

> In sum, we hold that the district court correctly granted summary judgment in favor of Occidental on the basis of the Liner Negligence Clause. The plain language of that clause effectively underwrites the unseaworthiness that caused the sinking of the OXY PRODUCER. In

> essence, it covers loss caused by the negligence of any person other than the insured, the owner, or the manager of the vessel. For purposes of this case, it is broad enough to cover the negligence of Hvide as the construction supervisor and the negligence of Avondale as the ship builder. At least to this extent, then, the Liner Negligence Clause waives or displaces the absolute warranty of seaworthiness implied at the inception of a time policy.

Pet. App. at 47.

REASONS FOR DENYING THE WRIT

1. The Question is of Limited Importance and the Decision Below Has Only Minimal Precedential Value.

Although claiming the ruling below will "wreak havoc with established marine insurance law" (Petition at 9), Petitioners fail to explain how such result follows from a narrow decision dealing with specific provisions in a marine insurance policy prepared by Petitioners and issued to Respondents. There certainly is no apparent decisional conflict among the lower courts on the narrow question presented here. Moreover, Petitioners otherwise fail to show why the question is of such importance as to warrant review by this Court. Indeed, despite the passage of some six months since publication of the decision below (and more than a year since publication of the

district court's decision in *American Maritime Cases*),[4] so far as undersigned counsel is aware it has not yet brought forth a single person or interest requesting *amicus curiae* status in support of the instant petition for certiorari. Nor have Petitioners been able to cite any evidence of concern over the decision other than that of the immediate parties involved.[5]

2. Both the Question Presented, and the Decision Below, Turn on Their Own Specific Facts.

The time hull policy issued to Occidental contained a Liner Negligence Clause, a species of "all risks" coverage according to one commentator (Pet. App. at 42), which greatly expands the coverage traditionally provided in marine hull policies, to include the "negligence . . . of any person", with the only qualification being that the loss "has not resulted from want of due diligence by the Assured. . . . "[6] And, as held in the decision below, the

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[4] In addition to publication in the official reports, the decision of the Fifth Circuit was also reported in *American Maritime Cases*, 1993 A.M.C. 1460.

[5] There is even considerable doubt, in light of this Court's decision in *Wilburn Boat Co. v Fireman's Fund Ins. Co.*, 348 U.S. 310, 319-21, 75 S. Ct. 368, 373-74, 99 L. Ed. 337 (1955), that a substantial federal admiralty question is presented. *See* the decision below, Pet. App. at 22-23, 44; Gilmore and Black, *The Law of Admiralty* (2d ed. 1975) at 68-69.

[6] The development and effect of the Liner Negligence Clause in marine hull policies, typically as a substitute for the arcane and litigation-fraught Inchmaree Clause, is well documented. *See*, generally, Tetreault, *The Hull Policy: The Inchmaree Clause*, 41 Tul. L. Rev. 325, 325-46 (1967); Alex L. Parks, *The Law*

"due diligence" requirement on the part of the assured operates as a waiver of, or displaces, the otherwise implied warranty of seaworthiness at inception of the risk. Pet. App. at 47.

The decision below is expressly limited to a "careful reading of the Liner Negligence Clause in the policy issued to Occidental," and the "plain language" of that clause which was held to be "unambiguous". Pet. App. at 45-47.[7] Such "standardized" marine insurance clauses as the Liner Negligence Clause (and its precursor, the Inchmaree Clause) are not written in stone; they are often modified or even superseded entirely.[8] Consequently, despite the Petitioners' expressed fears (Petition at 9), it can be expected that the marine insurance industry remains quite capable of tailoring its policies to accomplish its objectives.

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and Practice of Marine Insurance and Average (1st ed. 1987), at 406; Leslie J. Buglass, *Marine Insurance and General Average in the United States* (2d ed. 1981) at 139.

[7] These provisions, the court below held, unlike the negligence provisions in the Inchmaree Clause, are not limited to "operational negligence" but are "worded broadly enough to include the negligence of shipbuilders and the construction manager." Pet. App. at 46.

[8] Tetreault, *supra*, 41 Tul. L. Rev. at 334-35. Indeed, although the text of the Liner Negligence Clause is reproduced in Pet. App. at 70, the endorsement by which that clause was added to Occidental's policy recites that it replaces the "ADDITIONAL PERILS (INCHMAREE) clause of the attached Policy . . . ".

3. In Deciding the Question at Issue, One of First Impression, the Fifth Circuit Adhered to Settled Principles in Reaching the Correct Result on the Particular Facts

After framing the narrow question for decision the court below observed that "although it has received some attention from commentators, has not yet been squarely addressed by any court." Pet. App. at 43-44. It then proceeded "with caution."

The Court of Appeals first agreed with Petitioners' argument below that the implied warranty of seaworthiness at inception of the risk in a time policy, as in a voyage policy at inception of the voyage, is "absolute in nature, requiring neither knowledge nor fault on the part of the assured" (Pet. App. at 37-38; 27-39). It then proceeded to note the broader coverage provided under the Liner Negligence Clause (as compared to the Inchmaree Clause). Then, on the basis of its own precedent, *Tropical Marine Products, Inc. v. Birmingham Fire Ins. Co. of Pennsylvania*, 247 F.2d 116 (5th Cir.), *cert. den.*, 355 U.S. 903, 78 S. Ct. 331, 2 L. Ed. 2d 260 (1957), it determined to "look to the language" of the Liner Negligence Clause "to see if it unambiguously covers risks which would ordinarily be excluded by a breach of the implied warranty of seaworthiness." Pet. App. at 45.

Only after a "careful reading of the Liner Negligence Clause in the policy issued to Occidental" (Pet. App. at 45), and the "undisputed facts" (from the Underwriters' prior subrogation action against the shipbuilder and others) "that the loss of the Oxy Producer was not caused

by any lack of due diligence on the part of Occidental . . . nor . . . on the part of Hvide as manager of the vessel" (Pet. App. at 46-47), did the appellate court conclude that the district court correctly granted summary judgment in Occidental's favor "on the basis of the Liner Negligence Clause." Pet. App. at 47.

It is accordingly clear that the decision below, turning on its own special facts, does no violence whatever to (a) the decision of this Court in *The Caledonia*, 157 U.S. 124, 125, 15 S. Ct. 537, 541, 39 L. Ed. 644 (1895) (upholding the absolute nature of the implied warranty) or (b) the Fifth Circuit and other lower court decisions cited by Petitioners (Petition at 10-12). *None of those decisions involved a Liner Negligence Clause*, and Petitioners' efforts to equate such clause with an Inchmaree Clause (Petition at 14-16, 20) are unavailing.[9] Far from demonstrating any decisional conflict on the narrow question presented, the Underwriters are reduced to suggesting that the case should be remanded for the taking of additional evidence (Petition at 9, 22-23).

4. That the Decision Below is Based on a Summary Judgment Record is of No Consequence

Underwriters, complaining that the decision below is predicated on a summary judgment record (Petition at 9, 14), argue that factual issues should be developed, such as whatever other mechanisms might have been available for waiving what they contend (and the decision below

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[9] See note 8, supra, page 6.

held) to be an "absolute" implied warranty of seaworthiness at inception of a time policy (Pet. at 22-23). This assertion is not only contrary to Underwriters' earlier position,[10] but evinces a misunderstanding of the Fifth Circuit's decision to base its holding upon the interpretation of a particular provision in the specific policy of insurance issued to Occidental. Pet. App. at 43-47. This was a legal – not a factual – question. It is immaterial that there might be other mechanisms, within or apart from the insurance policy, for achieving the same result that was given by the "clear and unambiguous" language of that policy. Pet. App. at 45.[11]

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[10] Underwriters themselves had previously claimed there were no unresolved, pertinent factual issues. They also moved for summary judgment in the district court on the basis that there were no undisputed material facts; and both sides fully briefed, in the lower courts, the legal issues presented by the Liner Negligence Clause. Underwriters did not then suggest that there was an insufficient record for the courts to rule upon the legal effect of the provisions of the Liner Negligence Clause vis à vis whatever implied warranty of seaworthiness might otherwise be held to apply at inception of the risk.

[11] Contrary to Underwriters' assertion (Petition at 14), nowhere in the decision below did the court indicate an "unfounded belief" that the Liner Negligence "constituted the only basis" by which the implied warranty of seaworthiness at inception of the risk could be disclaimed in the policy. The court simply rejected Underwriters' view that a breach of the implied warranty of seaworthiness at inception of the policy precludes recovery "despite the presence of a clause in the policy expanding coverage", the court deciding instead to give effect to the specific language of the Liner Negligence Clause as effectively supplanting the implied warranty that otherwise might apply. Pet. App. at 43, 45-47.

5. Respondents' Other Arguments Support the Judgment Below.

Entirely apart from the particular provisions of the hull insurance policy which were held to preclude the Underwriters' recovery from their assured, Respondents offered below two additional discrete bases for defeating the Underwriters' cross-claim:

> (a) the parties' Standstill Agreement, which barred any action by the Underwriters against their assured except in one specified event only, which did not occur (Pet. App. at 14-25); and
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> (b) the various actions of the Underwriters by which they should be held to have waived, or be estopped from asserting, their cross-claim (Pet. App. at 49).

Although the court below held that neither of these separate and distinct issues could be decided on a summary judgment record (Pet. App. at 25, 49), either one could be dispositive of Underwriters' claim on the basis of a full trial record. Accordingly, even a reversal of the decision below on the narrow question presented here would not end the controversy.

CONCLUSION

For the foregoing reasons the petition for certiorari should be denied.

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